SUPREME COURT, U. S.
DEC 30 1971
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Supreme Court of the United States

No. 70-5064

RUTH J. JEFFERSON, EMMA GIPSON and JOSE APOLINAR VASQUEZ, individually and on behalf of their minor children, and on behalf of all other persons similarly situated,

Appellants,

v.

BURTON G. HACKNEY, Commissioner of the State Department of Public Welfare; WILL BOND, Chairman of the State Board of Public Welfare; LOUIS SARAZAN, Secretary of the State Board of Public Welfare; ROSALIND GILES, Director of Field Staff, Dallas Regional Office of the State Department of Public Welfare; individually and in their official capacities,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

BRIEF FOR APPELLANTS AND APPENDIX

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
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BRIEF FOR APPELLANTS

OPINIONS BELOW

The original decision of the three-judge court (Goldberg, C.J., Hughes, Taylor, D.J.J.) is reported at 304 F. Supp. 1332 (N.D. Tex. 1969). Judgment was entered in accordance with that decision on July 1, 1969 and amended on August 7, 1969. This Court vacated the judgment and remanded for further proceedings consistent with *Rosado v. Wyman*, 397 U.S. 397 (1970). *Jefferson v. Hackney*,

397 U.S. 821 (1970). On remand, the district court entered a new judgment on August 4, 1970 (160). The Court did not issue an opinion. On September 23, 1970, again without opinion, the district court overruled appellants' motion to amend the judgment (170).

JURISDICTION

This action was brought pursuant to 42 U.S.C. § 1983 to redress rights under 42 U.S.C. § 301 *et seq.*, 42 U.S.C. § 2000d and under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The instant appeal is being taken directly to this Court pursuant to 28 U.S.C. § 1253 which authorizes such an appeal after a three-judge district court has denied injunctive relief. The Court below consisted of three judges, convened pursuant to 28 U.S.C. §§ 2281, 2284. Probable jurisdiction was noted on October 12, 1971, 40 U.S.L.W. 3161.

CONSTITUTIONAL PROVISIONS, STATUTES REGULATIONS INVOLVED

1. Section one of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

> ". . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws."

2. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000-d, provides as follows:

> "No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

3. Section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23) provides as follows:

"A State Plan for aid and services to needy families with children must

* * * * *

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

4. Texas State Department of Public Welfare, Office Memorandum E-430, dated February 28, 1969, provides in pertinent part as follows:

"4. *Percentage of needs payment method*—Generally, this new budgeting concept will involve the following:

A. Determine need using the same allowances for all categories, as explained earlier. (In most cases, needs will be limited to a standard allowance for each adult and each child; allowances for shelter and utilities; and actual cost of prescribed drugs, if any.)

B. Multiply total needs by a predetermined percentage to arrive at the percentage of needs the Department can meet. (The percentage for each category will be determined by State Office on the basis of the number of recipients and the amount of funds available for each category.) The use of a percentage for determining recognizable needs would apply any reduction in grants to all cases in a category rather than lowering only those who are receiving a maximum grant. The percentage can be adjusted up or down to the amount of funds available, although it is anticipated that it will not vary any more than maximum grants have varied in the past.

C. After the percentage is applied to the total needs to arrive at "recognizable needs," the amount of net income (if any) will be deducted to derive the amount of grant."

5. Texas State Department of Public Welfare, Office Memorandum E-434, dated March 13, 1969, provides in pertinent part as follows:

> "As explained in E-430, effective May 1, 1969, a percentage payment method will be used to determine the amount of needs the Department can meet based upon the amount of available assistance funds and the number of recipients in each category.
>
> The percentages of needs the Department can meet as of May 1, 1969, have been officially approved as follows:
>
> OAA 100%
> APTD 95%
> AB 95%
> AFDC ..... 50%"

QUESTIONS PRESENTED

1. Whether Texas may provide needy mothers and children who are primarily Black and Mexican American and who receive public assistance under the federally-aided Aid to Families with Dependent Children program only 50 per cent of the amount which appellees have determined to be minimally necessary for survival in health and decency, while it provides 95-100 percent of the same minimally required amounts under other federally-aided programs to its needy aged, blind and disabled welfare recipients who are predominantly White and Anglo, consistent with the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and with Section 601 of the Civil Rights Act of 1964.

2. Whether Texas may ignore its AFDC standard of need, and instead use a fraction of that standard to determine eligibility for and the amount of AFDC assistance, thereby denying financial aid, employment training and medical assistance to persons who are needy under definitions of need established by appellees, consistent with § 402(a)(23) of the Social Security Act as construed by this Court last term in *Rosado v. Wyman*, 397 U.S. 397 (1970).

STATEMENT OF THE CASE.

Pursuant to the authority given by the Texas Constitution, Art. III, § 51-a, the Texas Legislature has enacted "a program of social security" in order to "provide necessary and prompt assistance to the citizens of [the] State" covered by the legislation (Public Welfare Act of 1941, Art. 695c, § 35. Those citizens are the needy children, aged, blind and disabled who meet the various eligibility requirements. In order to obtain federal reimbursement available for assistance rendered to these individuals, Texas participates in five federally-subsidized assistance programs, Aid to Families with Dependent Children (AFDC), Old Age Assistance (OAA), Aid to the Blind (AB), Aid to the Permanently and Totally Disabled (APTD), and Medical Assistance (Medicaid), and in return for its agreement to abide by Federal requirements receives over $350 million per year from the United States. This case involves both a Constitutional and federal statutory challenge to the administration of these federal-state programs in Texas.

The Constitutional claim (and the claim under the Civil Rights Act of 1964) involves a discrimination of the grossest sort in the determination of the amount of assistance provided to those persons, primarily Black and Mexican-American, who receive AFDC. The discrimination favors the "adult" recipients (mostly White-Anglo) in the other programs. While the Court has considered several Constitutional welfare cases to date, this is the first which presents a discrimination between AFDC and the other programs, rather than a discrimination which cuts across all of the programs, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969), or groups within a particular program, *Dandridge v. Williams*, 397 U.S. 471 (1971). The statutory claim grows out of the same statutes and regulations which gave rise to the Constitutional claim. The statutory question concerns the method of determining financial eligibility for, and the amount of, assistance under the AFDC program. Both claims must be resolved; a decision favorable to appellants on the statutory claim will not end the discrimination among the programs, and thus will

not dispose of the Constitutional and Civil Rights claims. Cf. *Dandridge v. Williams, supra; Wyman v. Rothstein,* 398 U.S. 275 (1970).

In order to qualify for federal matching, appellees have established a standard of need or "standard budgetary allowance" (96).[1] See *Rosado v. Wyman,* 397 U.S. 397 (1970); *Dandridge v. Williams, supra.* The Texas standard consists of a personal needs allowance (food, clothing, incidentals), shelter, allowance, and various special need items (96). Although not required to do so, appellees have made a judgment that the budgetary allowance schedules shall be applicable to all categories, and thus common standards are used to determine the needs of all recipients, regardless of category, except where particular characteristics of the individuals in the different programs justify a different or special allowance. Stipulation No. 63 (81).[2]

[1] Citations to the single appendix will appear as ( ).

[2] Thus the standard allowance for housing is the *same* for adults in all programs (including the mother in AFDC). Children have a smaller personal needs standard allowance on the theory (*not* here in issue) that children in a family unit have somewhat smaller individuals needs. Adults in all programs, however, have identical "personal needs." Certain special allowances are applicable to only one category, e.g. seeing eye dog allowance for the blind, because it is only needed in that category. Other special allowances are made to individuals in all categories who have a special need for them, such as eyeglasses or dentures. Counsel have been advised that the standard budgetary allowance applicable at the time the case was presented to the district court has been modified so as to increase the personal needs standard for adults receiving OAA, AB and APTD, but not for adult caretakers in AFDC. Thus Texas no longer has a completely uniform standard which cuts across all categories. We do not consider for purposes of the discussion of our Constitutional claim any facts not in the record before the district court, however, for the principles involved remain the same. Moreover, it is likely that the new facts relating to unequal OAA, AB and APTD standards would favor appellants, since the payment of 95-100% of the unequal standard has undoubtedly resulted in a sharper discrimination against AFDC, at a time when the state argues it is in a fiscal crisis.

The Texas standard is far from generous. Thus, a family of three children and their mother is determined by appellees to "need" $140, plus actual rent up to a maximum of $42 (if in public housing), each month, or assuming the maximum rent, $2184 per year.[3] By comparison, the federal "poverty level" is $3944 and the Bureau of Labor Statistics Lower Living Budget for a family of four, as of Spring 1970, in Austin Texas was $6197, in Dallas $6683, and Houston $6481.[4] Assuming some rational basis for the administrative determination to set "needs" at a given level, we concede that Texas may set a standard for each program wherever it choses. *Cf. King v. Smith*, 392 U.S. 609 (1968). While not conceding their rationality, appellants do not challenge in this suit the determinations made by appellants in setting those standards. Moreover, nothing in federal law requires Texas to pay 100% of need as it defines need in any of the categories. *Rosado v. Wyman, supra, Dandridge v. Williams, supra.* Texas in fact meets full need only in OAA. This suit does not challenge Texas' right to pay less than full need, nor will a victory for plaintiffs require the appropriation of more funds.

Prior to the commencement of this lawsuit in February 1969, Texas limited its public assistance payments by a schedule of maximum grants. Payments were made according to determined need up to the maximum. When appellees moved to reduce the AFDC grant maximums effective September 1, 1968 by $12 across the board, this suit was

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[3]Plaintiff Emma Gipson, for example, has three minor children. Assuming her rent is the same as it was when the complaint was filed ($25/month), her annual "needs" would be determined to be $1980.

[4]The federal poverty level was first established by Mollie Orshansky, of the Social Security Administration's Division of Research and Statistics (Social Security Bulletin, Jan. 1965). It has been updated since that date by use of the Bureau of Labor Statistics Consumer Price Index. The Bureau of Labor Statistics Lower Living Budgets for 1970 were released by the U.S. Department of Labor in a press release of December 12, 1970 (see Table I).

brought under 42 U.S.C. § 1983 to challenge such action under §402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23), a section appellants contended required an increase in AFDC *payments* by July 1, 1969, as well as under the Fourteenth Amendment and Civil Rights Act of 1964. The latter claims were predicated on the fact that the grant reductions allegedly required by a shortage of funds were limited to the AFDC category. Appellants sought injunctive relief against the reductions and a declaratory judgment of their invalidity. During the pendency of the case, and on February 25, 1969, appellees promulgated a statewide regulation known as E-430 (94) which abolished the AFDC maximum grant, provided for an 11% cost of living adjustment to the standard of need in all categories, and established a new method for computing welfare payments. That method requires first, that need be determined "using the same allowances for all categories"; second, that total needs be multiplied by a percentage factor to arrive at an amount designated as "recognizable needs;" third, the amount of net income, if any, is deducted from the "recognizable needs" to derive the amount of the grant. Department Memorandum E-434, dated March 13, 1969 (107), set the percentage factors at the following levels:

OAA	100%
APTD	95%
AB	95%
AFDC	50%[5]

An amended complaint was filed challenging the new method.

The consequences of the new budgetary procedures are significant. While under former methods, which included maximum grant limitations in all categories, full needs for a substantial majority of the "adult" recipients and for some

[5]The AFDC percentage was raised subsequent to the original decision below to 75%. We will use the 50% factor in this brief since that was the original percentage used.

AFDC recipients were met,[6] under the new policy *no AFDC* family can ever end up with more than 50 percent of its needs as determined by the State. Thus appellant Gipson, for example, with personal needs of $65, her children's needs pegged at $75 (at $25 per child), and with shelter needs of $25, would qualify for a monthly grant of $82.50 under the 50% limitation, despite admitted needs of $165 per month. If Mrs. Gipson were to start receiving child support, for example, her grant would be reduced dollar for dollar by the amount of that support. Thus assuming $50 per month support, her grant would be $32.50. Her "unmet needs" would remain the same, however, i.e., 50% of her total needs. In comparison, an aged couple receiving OAA with the same shelter cost as Mrs. Gipson has almost identical "needs" according to appellees, and with equivalent income (for example $50 social security benefits) would receive a grant of $110 per month,[7] or 100% of their needs.

Appellants' constitutional claim is that once "need" is determined by the state for each group of eligible recipients, the state may not discriminate with regard to the percentage of that need it chooses to pay in welfare benefits. The Constitutional and Civil Rights issue in this case does not arise solely from the present differential treatment of welfare recipients in Texas in the percentage of needs met, but rests upon a long history of discrimination against recipients aided in the AFDC program. As is more fully set out in Point I, *infra*, a dual system governs what happens to welfare recipients in Texas. One system governs the treatment of AFDC

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[6]Stipulations 57 and 58 give the following breakdown: full needs were met in OAA for 91.87% of the recipients, in APTD, 74.4%, AB, 72.4%, and AFDC 43.6% (80).

[7]

Personal needs	$130 ($65 per recipient)
Shelter	$ 25
"needs"	$155
Social Security (less 5.00 credit)	$ .45
Payment	$110

recipients, who are almost 90% Black and Mexican-American mothers and children. Needless to say, as established by the testimony, this group of recipients exerts little political power and is extremely unpopular vis-a-vis the other categories of recipients. Another vastly better system governs the treatment of OAA recipients, two-thirds of whom are White-Anglos with significant political power (72, 73). The facts, which are more fully set out *infra*, make it clear that the grossest sort of discrimination is being perpetrated in the Texas welfare programs.

The consequences of the new budgetary method are significant for the statutory claim as well. Prior to May 1, 1969 all recipients who had some net income, if in an amount less than the standard of need, received a monthly assistance payment from the welfare department. They received such a payment, if otherwise eligible, because they were "needy" under Texas' definition of need. To be sure, the payment may not have met the budgetary deficit of all families in full (standard of need less income) because of the maximum grant limitation. But *all* needy families with children received some aid (and along with financial assistance, medical assistance eligibility).

Thus, plaintiff Davila,[8] who receives approximately $120 per month support for her three children, qualified under the old system for a grant of $54 per month to meet her budget deficit. In addition, she and her children were eligible for Medicaid. Following the adoption of the 50% reduction on May 1, 1969, Mrs. Davila became *ineligible* for assistance despite the fact that her total needs as determined by the standard of need actually *increased* by virtue of the 11% increase in the need standard. The reason for this anamolous result is that although she became "needier,"

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[8]Plaintiff Davila, a member of the class represented on this appeal, was a plaintiff in the suit consolidated for trial with *Jefferson, Davila v. Hackney*, No. 3-3126B, W.D. Tex., and decided together with *Jefferson*.

Mrs. Davila's income is greater than *half* of her adjusted total needs, and since under the new method income is subtracted from the *reduced* standard, she became ineligible for AFDC *and* medical assistance. Under the new procedure, only those needy families with net income less than their "recognizable needs" (i.e. 50% of the standard) qualify for an AFDC payment, and consequent medicaid coverage. Appellants' claim with respect to § 402(a)(23) is simply that the cost-of-living adjusted standard of need must be used to determine financial eligibility for AFDC.

The three-judge court ruled on July 1, 1969 that the Texas welfare regulation did not violate the Fourteenth Amendment or the Civil Rights Act of 1964. The Court held that while the disparate grant amounts do appear to discriminate against AFDC recipients, the size of the grants is not dispositive, and the "structure and purposes" of the Social Security Act must also be considered in judging the constitutional claim. 304 F. Supp. at 1336. The court, in evaluating the grant discrimination in that light, upheld it under the traditional equal protection standard. The court held that while all programs are directed to the relief of financial need, the AFDC program primarily emphasizes the strengthening of family life, while the non-AFDC programs emphasize retention and creation of the "ability for self-care." *Ibid.* Those disparate purposes were held to justify differences in state financial support to the various programs, and the wide differences in percentage of needs met. Finally, the Court found that the evidence of racial discrimination was not sufficient, and thus rejected the special scrutiny test appellants urged was required in evaluating the discrimination. In making its finding, the court relied heavily on the absence of proof of a racially discriminatory *intent* in enacting the the legislation. The district court did hold, however, that the cutbacks violated § 402(a)(23) of the Social Security Act. The court's theory on the latter claim was that § 402 (a)(23) required an increase in *payments*, and that the new

budgetary methods worked a reduction instead. 304 F. Supp. 1332.[9]

Both plaintiffs and defendants appealed. In the interim this Court decided *Rosado v. Wyman, supra,* and construed §402(a)(23) for the first time. In order to give the lower court an opportunity to reevaluate its decision in light of *Rosado,* the Court vacated the original judgment and remanded for reconsideration of its opinion in light of *Rosado.* 397 U.S. 821 (1971). On remand, appellants argued that while *Rosado* does stand for the proposition that AFDC payments may be reduced without violating §402(a)(23), that section does prohibit reductions which negate the important practical consequence of that statute—i.e., to increase AFDC eligibility for those with marginal incomes which for the first time fall below the need standard. The district court entered a new judgment on the federal statutory claim. The court held without opinion that the Texas program satisfies the requirement of §402(a)(23) and is in conformity with the decision of this Court in *Rosado.* In addition, the district court reaffirmed its earlier decision that the substantial difference between treatment of AFDC recipients from those in the "adult" programs did not deprive appellants of equal protection. Plaintiffs appealed to this Court once again, and probable jurisdiction was noted on October 12, 1971.

SUMMARY OF ARGUMENTS

I

Appellants' Constitutional claim rests on the proposition that once Texas officials made a determination that certain groups of dependent individuals should be provided public assistance to help relieve their financial need, and defined the standard which such individuals require to live in "health and decency" (the "standard of need"), they acted irration-

[9]Of course, if *payments* had to be increased under the court's rationale, so did eligibility for those payments.

ally and arbitrarily by determining to sustain some of those individuals (the "adult" recipients, who are two-thirds White-Anglo) at 100% of the standard, and others (children deprived of parental care because of the absence or incapacity of a parent, almost 90% of whom are Black and Mexican-American) at only 50% of the standard. Appellants also contend that this discrimination in the distribution of federal funds which help finance Texas' welfare program violates Title VI of the Civil Rights Act of 1964.

Appellees administer a comprehensive "program of social security" under which assistance is provided to needy dependent children (AFDC) and to the needy aged (OAA), blind (AB) and disabled (APTD). Under both the state and federal statutes all programs share common purposes—the relief of financial need through the provision of cash assistance, and the reduction of dependency through the provision of social services. Policies are set by the same state board, and the programs are administered by a single state agency in accordance with the same procedures.

Despite the basic characteristics common to all four programs, a dual system operates in Texas. Six times the total amount of funds (and ten times the amount of *state* funds) are spent on the "adult" programs than on AFDC, though the recipients of the former programs number less than twice the number of AFDC recipients. Thus although the state has determined needs by standards common to all categories, AFDC recipients receive at the most only 50% of their needs, while the "adult" recipients receive virtually all of their needs (95 to 100%). The discrimination is all the more suspicious in light of the fact that the Legislature has had the power since 1965 to redistribute funds among the programs as long as it stays within a total ceiling. The huge disparity in grants may be explained by the different racial and ethnic characteristics of the recipients in the two systems; the greater relative political power of the OAA recipients; the "preference" for the OAA group among the voters and legislators (conceded by appellees); and the his-

torical social prejudice against the AFDC group, many of whom are unmarried mothers with illegitimate children.

The district court used the wrong equal protection test in measuring the discrimination. The discrimination should have been subjected to a special scrutiny since, while neutral on its face in terms of race, its obvious *effect* was to disproportionately burden Black and Mexican-American welfare recipients. *Dandridge v. Williams*, 397 U.S. 471, 485, n. 17. If this test had been used, the classification would have been invalidated since Texas established no compelling justification for the racially selective device it has chosen to trim its welfare budget. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The lower court, however, found no racial discrimination, relying heavily on the fact that appellees allegedly did not know the racial make-up of the programs when the discriminatory rules were promulgated.

The Legislature's motive is not relevant to the constitutional inquiry, *Palmer v. Thompson*, 403 U.S. 217 (1971), it is the natural result of the legislation which must be measured. Racial discriminations today are perpetrated with much sophistication, and rarely appear on the face of the law. Discriminators no longer openly profess that their decisions are racially based. It was for such reasons that this Court developed the doctrine that a *prima facie* case of racial discrimination can be made objectively, and with statistics.

It was overwhelming proof of this sort, coupled with proof of a tradition of discriminatory welfare policies in Texas, which the lower court rejected in favor of allegations of good faith, and inconclusive evidence which did not rebut or justify the extent of the discrimination. For example, the court's failure to find a racially discriminatory policy was based mainly on several increases in appropriations for the AFDC category since 1943, which finding ignored the fact that those increases failed to keep pace with the growth of the program, while OAA increases far outpaced program growth. Thus *recipients* of AFDC, as opposed to the *state budget* for AFDC, have fared relatively poorly over the years.

The district court should have invalidated the discrimination between AFDC and OAA even under the traditional equal protection test which it used. The state's determination to pay 50% of monthly subsistence needs to one group of needy and dependent welfare recipients, and 95 to 100% to another group of needy and dependent recipients was based solely on the *reason* for their dependency, *not* the extent of their financial need. None of the "justifications" offered by the state for their classification were rationally based; the classification was not shown to have been based on criteria related to any legitimate purpose of the federal or state welfare program.

The state claimed that the AFDC recipients "need" only 50% of what the state had already determined they in fact need, compared to "adult" recipients who it is said "need" 100% of what the state determined they actually need. This frivolous argument is not only self-contradictory, but it is based on unsupportable and unsupported assumptions and a misconception of the nature of public assistance budgeting. Thus the state relies on the assumption that AFDC children can obtain employment, or will likely receive financial support from a relative (e.g. the absent father), whereas the aged recipients allegedly do not have such a potential. This ignores the fact that any income which is in fact available is subtracted first and so has already been counted in the grant computation process; indeed, since the state divides the AFDC standard of need in half *before* subtracting income, any such income is subtracted from the grant dollar for dollar, thus negating the possibility that the reduction might operate as a work or support incentive. *Cf. Dandridge v. Williams, supra.* Moreover, the record showed that most AFDC mothers are so uneducated or incapacitated that they cannot qualify for even the lowest paying jobs. The state has impermissibly based a grant reduction on the *assumption* of income not actually or likely to become available, which it cannot do under the Social Security Act, *e.g., Lewis v. Martin,* 397 U.S. 552 (1970); *King v. Smith,*

392 U.S. 309 (1968). Moreover, assuming the relevance of a mere potential for financial support to a percentage reduction device, the state has deliberately chosen to ignore the fact that most OAA, AB and APTD recipients have a source of income and thus potential for support not available for AFDC mothers, namely social security benefits.

Finally, the district court justified the 50% disparity in percentage of needs met on the basis that each program has a second purpose in addition to providing financial aid, and this purpose differs in each program. Thus, in AFDC the purpose was said to be to strengthen family life, whereas self-care was seen as the purpose of the "adult" programs. Even assuming the court correctly discerned a variance in program purpose, that would not by itself justify any and all discriminations, but only those related to that particular purpose. The purposes on which the lower court relied are non-financial in scope—they are accomplished by the rendering of social services. Grant differentials cannot be justified by an alleged difference in need for social services, particularly where financial aid is the *primary* purpose of all the programs. Moreover, the additional purposes are in fact identical, all designed to reduce dependency (from whatever cause) through a variety of rehabilitative services—this the legislative history making clear.

The discrimination in payments also violates Title VI of the Civil Rights Act. Through Title VI Congress has expressed special concern for policing discriminatory state action which is Federally supported. HEW regulations enforcing Title VI make clear that the statute applies even where the state action is racially neutral on its face. Recipients of federal funds "may not take action that is calculated to bring about indirectly what (Title VI) forbids to accomplish directly." 45 C.F.R. §80.65(h). This Court's decision in *Griggs v. Duke Power Co.*, 400 U.S. 813 (1971), in which a neutral promotion test was invalidated under Title VII since proportionately fewer Blacks succeeded in obtaining promotion under the test than Whites, and since no compelling business necessity for the test was established, is a helpful analogy and should be applied to Title VI as well.

II

Texas' method for determining AFDC eligibility runs counter to the requirement of § 402(a)(23) which mandated Texas to have adjusted, by July 1, 1969, the "amounts used to determine the needs of individuals" to reflect increases in living costs. After Texas made the required adjustment to its standard, it began using only 50% of those amounts as the standard for determining eligibility for assistance, despite this Court's clear ruling in *Rosado* that the standard of need is the "yardstick" for determining eligibility and that it may not be reduced below the level of January 2, 1968, the enactment date of § 402(a)(23).

The statutory issue in this case has actually been decided by the Court in *Rosado v. Wyman*, 397 U.S. 397 (1970), favorably to appellants' claim. New York was found in *Rosado* to have violated § 402(a)(23) when it reduced its standard of need by eliminating items therefrom, because in the process it had "circumnavigated" the intended practical consequence of the statute, namely

> "of requiring the States to recognize and accept the responsibility for those additional individuals whose income falls short of the standard of need as computed in light of economic realities and to place them amongst those eligible for the care and training provisions." 397 U.S. at 413.

Texas' use of an amount which is 50% of the standard of need to determine eligibility negated its 11% cost-of-living increase to the standard of need since it prevented those "marginal income" families who are now "needy" under Texas' revised standard from receiving aid. (Indeed, almost 2500 families who were theretofore receiving aid were eliminated from the rolls).

The Government's contention that the question of whether a percentage reduction could be applied to deny benefits to some needy individuals was not before the court in *Rosado* is belied by the Court's explicit reliance on the increased eligibility function of § 402(a)(23) in order to find some

practical meaning to that statute. Once it rejected petitioners' claim that *payment* adjustments were mandated, the Court found meaning for the section *by accepting the one urged by HEW*, namely that compliance with the adjustment requirement to the needs standard (even without an increase in payments) would at least make more persons eligible for supplementary assistance, medical care, and employment training. In so doing, the Court set out how a ratable reduction works:

> "A 'ratable reduction' represents a fixed percentage of the standard of need that will be paid to all recipients. In the event that there is some income *which is first deducted*, the ratable reduction is applied to the amount by which the individual or family income falls short of need." 397 U.S. at 409 n. 13 (emphasis added).

Only if a ratable is used in such a way will the eligibility consequences of the statute materialize. Texas has avoided this result by applying the reduction to the standard of need *before* income is subtracted. As a consequence, many needy families under Texas' standard lose all AFDC payments, as well as medicaid eligibility.

The Court's interpretation of the effect of § 402(a)(23) in *Rosado* is consistent with the legislative history of the section, and with the historical function of the standard of need as the eligibility determinant in the federal public assistance programs since their inception. The testimony and documentation provided Congress in 1967 in support of HEW's proposal to require payment of 100% of need showed generally low assistance standards in the various states, and identified such standards as the ones which were being used as eligibility standards for AFDC. HEW also showed Congress that payments were reduced below these standards in many states by either maximums or percentage reductions to the budgetary deficit, not by reductions to the standard of need itself. Thus the adjustment Congress necessarily required by § 402(a)(23) was to these low *eligibility standards*, and thus it is this standard which must be maintained after the adjustment.

Moreover, in all publications, regulations and policy issuances by the federal agency prior to January 1970 the standard of need is described as the "yardstick" for determining eligibility. Indeed, HEW regulations specifically require that each state establish "a statewide standard . . . to be used in determining . . . need . . . and . . . the amount of the assistance payment." 45 C.F.R. § 233.20(a)(2). Moreover, federal rules require that "in establishing financial eligibility . . . income . . . will be considered in relation to the State's standard of assistance." 45 C.F.R. § 233.20(a)(3)(ii).

The only exception to these consistent HEW definitions of the standard of need as the eligibility level came three months before the *Rosado* decision in a State Letter (No. 1074) which set forth the agency's view that the standard of need did not thereafter have to be used to determine eligibility, and that a new "payment standard" could be established for the purpose. The obvious inconsistency of State Letter 1074 with § 402(a)(23) and other agency regulations and policies which were established without regard to § 402(a)(23) and the fiscal and political consequences of increased eligibility, clearly demonstrates HEW's reluctance to impose any burdens whatsoever on state welfare departments as a result of § 402(a)(23). Moreover, HEW's approval of the Texas method is in conflict with the agency's position in its *amicus* brief in *Engelman v. Amos*, 40 U.S.L.W. 3216 (Nov. 9, 1971), where it contended that payment reductions could not be accomplished by a method which was not related to, but rather separate from, the determination of need. Texas' reduction method results in payments which are not related to the amount of assistance determined to be needed under the state's standard of need, contrary to the *Amos* decision and HEW regulations, *e.g.*, 45 C.F.R. § 233.20(a)(3)(viii).

Finally, HEW's interpretation of § 402(a)(23) places that section in conflict with other provisions of the Social Security Act. In keying eligibility for medical assistance, work incentives, employment training and social services to the

receipt of cash assistance, Congress has consistently assumed that all who were needy under state standards, and otherwise eligible, were receiving *some* aid. Moreover, that was the interpretation placed on the Act, in particular § 402(a)(10), by this Court in *Dandridge v. Williams, supra,* in which the Court held that "so long as some aid is provided to all eligible families and all eligible children, the statute itself is not violated." 397 U.S. at 481. Texas denies aid completely to many children who are dependent and needy under the state's standards. See *King v. Smith, supra.* Such a result would not obtain if Texas used its revised standard to measure AFDC eligibility.

ARGUMENT

POINT I

THE PAYMENT BY TEXAS OF A SUBSTANTIALLY LOWER PERCENTAGE OF STATE DETERMINED "NEEDS" TO RECIPIENTS OF AFDC THAN IS PROVIDED TO RECIPIENTS WITH THE SAME "NEEDS" IN THE "ADULT" PROGRAMS, OAA, AB AND APTD, DEPRIVES APPELLANTS OF THE EQUAL PROTECTION OF THE LAWS TO WHICH THEY ARE ENTITLED, AND OF THEIR RIGHT UNDER THE CIVIL RIGHTS ACT OF 1964 TO BE FREE FROM RACIAL DISCRIMINATION IN A FEDERALLY FUNDED PROGRAM.

Appellants' basic position is that once the appropriate Texas officials fixed upon a standard of need for each of the categories of public assistance, thus explicitly acknowledging the minimum amounts they deem necessary for applicants and recipients in the respective categories to achieve "economic security," Texas may not arbitrarily provide assistance payments at a lower percentage of determined need in AFDC than it does for the other categories. If it must reduce payments below the need standard, Texas must do so uniformly in all programs.

Appellants are aware of the difficult burden they face in overturning a state's decision as to the proper allocation of its welfare funds. Nonetheless, as we shall demonstrate

below, appellees have not established a "solid foundation" for the discrimination in payment levels to AFDC families, such as this Court found for the family maximum in *Dandridge*, 397 U.S. at 486. Indeed, their proferred justifications border on the frivolous. Moreover, we urge the Court to apply a more rigorous standard of review in this case than was found to be applicable in *Dandridge*. First, the discrimination here is leveled against an historically unpopular and disenfranchised group, AFDC mothers and their children, many of whom are illegitimate. In *Dandridge* there was no traditional prejudice against large families *per se*. Second, and most important, in this case the record establishes that the discrimination against AFDC has an overwhelming racial impact, disproportionately subjecting Blacks and Mexican-Americans to the vicissitudes of public opinion and fiscal limitations. See *Dandridge v. Williams*, 397 U.S. at 485 n. 17.

A. Texas' Dual System of Welfare

1. *The Unified Aspects of the Welfare Structure*

Texas' welfare programs are authorized by the State Constitution, which provides, in a single section, that the Legislature

> "shall have the power to provide for assistance grants to and/or medical care for, and for rehabilitation and any other services included in . . . federal laws . . . on behalf of:
>
> (1) needy aged persons . . .
>
> (2) needy individuals who are totally and permanently disabled . . .
>
> (3) needy blind persons . . . [and]
>
> (4) needy dependent children and the caretakers of such children."
>
> Constitution of Texas, Art. III, § 51-a.

Section 51-a places a $60,000,000 ceiling on total annual expenditures for such public assistance payments (excluding

medicaid).[10] Until 1945, this constitutional authority for the provision of public assistance had been divided into separate sections, each including a different category of needy citizens and each providing for a separate appropriations ceiling, but all were consolidated into a *single provision* (§51-a) that year.[11]

Pursuant to this general constitutional authority, the Texas Legislature has enacted a comprehensive "program of social security," Public Welfare Act of 1941, Art. 695c, §35.[12] A single state agency, the State Department of Public Welfare, whose Commissioner is appointed by a Board of Public Welfare, is charged with administering *all* such programs. The state agency is authorized in a *single* provision to provide in *all* programs "the entire range of public welfare assistance and/or services designed to help families and individuals attain or retain capability for independence or self-care and for such rehabilitation and other services prescribed or authorized under Federal laws . . ." *Id.* at §4 (12). Since the issue in this case relates to relative financial assistance levels it is critical to note that appellees testified below that the provision of financial assistance was the fundamental purpose of all four welfare programs, and the common "philosophy" of each. Sarazan Dep. p. 51, see

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[10]The ceiling was $60,000,000 at the time of the district court's decision, but was raised subsequently to $80,000.000.

[11]In 1935, the general prohibition on public grants, Art. III, §51, was bypassed by the addition of a §51-b, authorizing grants for needy aged citizens. In 1937, §51-c was added to permit aid to the blind, and to dependent children. In 1945, as noted in text, an amendment "combined these three programs." Texas State Library, Legislative Reference Division, Comment, V.A. Const. Tex.; following Art. III, §51-a. In 1956, §51-b-1 was added to authorize aid to the disabled, which was combined with the other categories in 1963. In 1965, authority for medical assistance was added, and the maximums for appropriations for each program were abolished with the overall ceiling retained.

[12]See V.A.T.S., Art. 695c, §§12 *et seq.* (AB); 16-A *et seq.* (APTD); 17 *et seq.* (AFDC); 20 *et seq.* (OAA).

Stipulation No. 85 (85). Thus, in accord with this common purpose to provide for the basic survival needs of the state's dependent citizens, appellees, as noted above, have determined those minimal needs by using common financial standards.

Thus, the four welfare programs share several fundamental characteristics. Their beneficiaries are all "needy," as defined by the state and their beneficiaries are all "dependent," *i.e.*, unable to support themselves without public aid. While the *source* of their dependency may differ (old age, physical incapacity, childhood and lack of parental care, blindness), all beneficiaries are by definition equally reliant upon the state for their survival. The programs share common purposes, are administered by the same state board, and in accordance with the same state statutory provisions governing applications, investigations and appeals.

The essential similarity between the various Texas programs is not surprising in light of the basic structure of the federal Social Security Act, 42 U.S.C. §301 *et seq.*, which the Texas legislation mirrors. The Act currently provides grants-in-aid to the states for four programs, OAA (Title I), AFDC (Title IV), APTD (Title XIV) and AB (Title X). In enacting the original measure in 1935, Congress refused to give federal financial support for *all* needy people. It selected the primary groups of needy dependent people who lacked a "breadwinner" owing them a legal duty of support. These two groups were the old people and the dependent children whose father was dead, disabled or had deserted. See Report of the Committee on Economic Security to President Roosevelt, Hearings Before the Committee on Senate Finance, on S. 1130, pp. 1313-1315, 1339 (1935). Unemployment insurance, work programs, etc., were to be provided for those needy people who could work. *Ibid.* See, *e.g.*, *King v. Smith, supra.*[13] That all beneficiaries of fed-

[13]The distinction is emphasized again and again in the original document leading to the Act. Thus, in the Staff Report of the Committee on Economic Security, it was emphasized that old age assistance is designed "to give immediate aid to aged individuals . . . who are not

erally-aided assistance were deemed to be *similarly situated with respect to their financial need and ability to provide for themselves* was specifically noted by the Committee on Ways and Means in reporting out the original legislation:

> "The bill is designed to aid the States in taking care of the *dependent members* of their population, and to make a beginning in the development of measures which will reduce dependency in the future. It deals with four major subjects: Old-Age Security, Unemployment Compensation, security for children, and public health. *These subjects are closely related, all being concerned with major causes of dependency. Together they constitute an important step in a well-rounded, unified long-range program for social security.*" H.R. Rep. No. 615, 74th Cong., 1st Sess. (1935), p. 3 (emphasis added).

In sum the beneficiaries of the federal programs, as paralleled by Texas' program, share the basic characteristics of *need* and *dependence.*

Each of the Federal titles reflects the common antecedents for the federal programs, namely the desperate financial need of a class of citizens, and the dependence of those citizens on their government. Thus the "purposes" of AFDC, OAA, and AB in the *original* Act were identically stated to be "to furnish financial assistance" to the dependent individuals covered in the particular title. Pub. L. No. 241, 74th Cong., 1st Sess. (1935), §§ 1, 401, 1001. To be sure, the single purpose of the federal public assistance effort was thereafter expanded to reach beyond the furnishing of cash

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employable on work projects;" aid to children was enacted because "Attempts to provide social security for the unemployed . . . will not benefit families whose breadwinners are absent. For these groups of families, special provision must be made." Social Security in America: The Factual Background of the Social Security Act as Summarized by Staff Reports to the Committee on Economic Security at pp. 217, 230 (1937). The blind were also included in the original recommendations and act. Later on, aid to the permanently and totally disabled was added to the Social Security Act.

public assistance. However, the major redefinition of legislative "purpose" in all the categorical programs, which occurred in 1956, once again emphasized the identity of legislative purpose among the programs.

Thus, §§ 1, 401, 1001, and 1401 were all amended in 1956 to add the additional goal of the federal legislation, namely the provision of social and rehabilitative services, intended, according to the general statement of purpose applicable to *all* the 1956 amendments, to help "to strengthen family life and [to help] needy families and individuals attain the maximum economic and personal independence of which they are capable." Pub. L. 84-880, § 300, 84th Cong., 2d Sess. (1956), U.S. Code Cong. and Admin. News 990 (1956).[14] Congress apparently believed in 1956 that relieving financial need would not suffice, and so it included as an objective in each of its four programs the elimination of dependency (as distinct from need) through the availability of social services.

Despite the basic characteristics common to all four programs noted above, a dual system governs what happens to the recipients. Below we describe the following characteristics of the dual system of welfare, concentrating on the

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[14] Thus § 1(OAA) was amended to add the purpose "of encouraging each State . . . to help such individuals attain self-care." Pub. L. 84-880, § 311. Section 1001 (AB) was amended to add the purpose "of encouraging each State . . . to help such individuals attain self-support or self-care." Pub. L. 84-880, § 313. Section 1401 (APTD) was similarly amended. Section 401 (AFDC) was likewise amended to reflect the same general rehabilitative purpose, but was structured to take into account the particular cause of AFDC dependency, such as broken homes. Thus the new AFDC purpose was "to help maintain and strengthen family life and to help such parents or relatives to attain the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection." Pub. L. 84-880, § 312. The new statutory purpose was implemented by adding to *each program* the same plan requirement which required each state to provide a description of those services it would provide to accomplish the desired objective. 42 U.S.C. §§ 302(a)(11); 602(a)(14); 1202(a)(12); 1352(a)(11).

two large programs, AFDC and OAA, but noting pertinent facts with regard to APTD and AB as well: (1) the gross differences in the total monies expended on the recipients in the two systems; (2) the gross differences in the state funds requested by appellees and appropriated by the legislature for the recipients of the two systems; (3) the different racial and ethnic characteristics of the recipients in the two systems; (4) the greater political power of the OAA recipients; (5) the different social attitudes toward the recipients in the two systems, including the special exclusionary policies applied to applicants for AFDC, until ruled illegal by the federal welfare agency and the Supreme Court. Finally, and most importantly, we review the effect of these differences on grant levels.

2. *The Gross Difference in State Appropriations and Total Monies Expended on AFDC Recipients and "Adult" Program Recipients*

One basic difference between the treatment afforded recipients under Texas' dual system of welfare is seen by examining the amount of money (federal, state and total) expended upon the recipients of AFDC as distinguished from the recipients of the "adult" programs, especially OAA. These are set out immediately below.

NET FUND EXPENDITURES FOR OAA, APTD, AB AND AFDC IN TEXAS BY SOURCE OF FUNDS FOR THE FISCAL YEAR ENDED AUGUST 31, 1968

PROGRAM	TOTAL	SOURCE		% FROM
		Federal	*State*	*State*
OAA	$167,529,066.54	$119,366,167.78	$48,162,898.76	29%
APTD	$ 10,020,681.00	$ 5,773,561.75	$ 4,247,119.25	42%
AB	$ 3,719,944.00	$ 2,319,978.17	$ 1,399,965.83	38%
AFDC	$ 32,425,700.00	$. 26,276,272.27	$ 6,149,427.73	19%

SOURCE: Texas State Dept. of Public Welfare, 1968 Annual Report, Table 2, Stipulation 25 (71).

These expenditures should be considered in relation to the total number of recipients in each program, set out in the table below.

NUMBER OF RECIPIENTS BY PROGRAM
IN AUGUST, 1968

PROGRAM	NUMBER OF RECIPIENTS
OAA	229,654 recipients
APTD	15,962 recipients
AB	4,154 recipients
AFDC	138,942 mother & children recipients

SOURCE: Texas State Dept. of Public Welfare, 1968 Annual Report, p. 3 and Table 6, Stipulation 26 (71).

As can be seen from the above, almost six times the total amount of welfare funds and ten times the amount of state funds alone are spent on the "adult" programs than on AFDC, though the recipients of the former programs number less than twice the number of AFDC recipients. The state contributes a smaller percentage of funds to AFDC than to any other program. Although there are seven times as many AFDC recipients, the state's share of funds is hardly more for AFDC than for the combined amounts for APTD and AB.[15] On a national basis, Texas has the seventh highest per capita contribution to OAA ($4.88) and the third lowest per capita contribution to AFDC (60¢). National average per capita contribution to OAA is $3.10 and to AFDC $5.10. Department of Public Welfare, 1968 Annual Report, Table 4. No argument as to different "need" can count for the striking disparity in appropriations for AFDC as against

[15]The "average" OAA payment per recipient in June 1968 was $60.25; the "average" AB payment was $72.70; the "average" APTD payment was $56.30; the "average" AFDC payment per recipient (mother and children) was approximately $20.70. See Dept. of Public Welfare, 1968 Annual Report, Table 8, and Charts 8, 9 and 11.

the adult programs.[16] The failure to give a larger share to AFDC is especially peculiar in light of the *greater* number of federal dollars each state dollar appropriated for AFDC brings as compared to the other programs. Hackney Dep., p. 81.

[16]In his deposition, appellee Hackney attempted to counter the obvious implications of the above figures by stressing that there were about eight (8) times as many *households* in OAA as in AFDC (where there were 30,454 family units in August, 1968). Hackney Dep., p. 69. His argument was that greater OAA expenditures may be caused by utility and rental costs which allegedly remain more or less constant per household, and that the eight to one ratio of expenditures was merely reflective of the ratio of household units in OAA and AFDC. Mr. Hackney's argument is misleading for several reasons:

(1) In fact, appellees have determined that household needs for rent *do* vary with the size of the household, and they thus budget larger families for a higher shelter maximum than smaller families.

(2) The extra-large percentage of total appropriations for OAA is sufficient to have virtually 100% of OAA recipient needs provided for, while the AFDC recipients receive only enough monies to pay for 50% of their needs (including rent). Thus *extra* needs of elderly people do not account for the large differential in expenditures for OAA as against AFDC.

(3) Though the "family units" (requiring, possibly, separate rent) are at best only two-thirds as many in AFDC as in APTD and AB combined, and the total number of APTD and AB recipients are only one-seventh as many as in AFDC, the state contribution to those two programs is almost the same as to AFDC. The disparity between "unmet need" in AFDC, on the one hand, and APTD and AB on the other, is also sharp.

3. *The Racial and Ethnic Characteristics of AFDC as Distinguished from the "Adult" Programs*

The table below sets forth the racial and ethnic characteristics of each of the programs as of March 1, 1969:

RACIAL AND ETHNIC CHARACTERISTICS OF RECIPIENTS, BY CATEGORY, AS OF MARCH 1, 1969

PROGRAM	WHITE-ANGLO	BLACK AND MEXICAN-AMERICAN	BLACK	MEXICAN-AMERICAN
AFDC	15.4%	84.6%	44.6%	40.0%
OAA	62.5%	37.5%	22.0%	15.5%
APTD	56.6%	43.4%	26.9%	16.5%
AB	44.3%	55.7%	31.1%	19.6%

SOURCE: Defendants' Answers to Plaintiff Davila and Gutierrez's Written Interrogatories Numbers 19 and 20; Stipulation 31 (72).

Figures for the whole of 1967 and 1968 reveal closely corresponding percentages. Stipulation 33 (73).

The "adult" programs, therefore, are a majority White. The AFDC program is overwhelmingly Black and Mexican-American. The program with the greatest majority of White-Anglos gets the largest share of state expenditures for its size; the two adult programs with a lesser number of White-Anglos get the next largest share in relation to size; the program getting the smallest share of state and local expenditures in relation to size is the largely Black and Mexican-American program, AFDC.

4. *AFDC Recipients Are Politically Powerless and the Subjects of Social Prejudice Based on the Circumstances of Both Family Status and Race*

While legislative motive is never determinative in analyzing a classification under the equal protection clause, *cf., Palmer v. Thompson*, 403 U.S. 217 (1971), and section B *infra*, the fantastically wide margin in actual expenditures for the adult welfare programs compared to those in AFDC

are in fact explainable in terms of the historical public "preference" for OAA and hostility to the AFDC category of recipients, an attitude which reflects both the family status of most AFDC families, their racial composition, and lack of raw voting power in comparison to OAA.

First, it is well to remember just who is eligible to receive AFDC in the first place. To qualify, the children must be deprived of parental support due to the death, incapacity or absence of one parent (usually the father). 42 U.S.C. §606. "Absence" would qualify a family where the father deserted, or indeed, where he never maintained a home with the children. Thus, AFDC families and potential eligibles often consist of illegitimate children, and parents who have not conformed to society's mores. See Steiner, *Social Insecurity: The Politics of Welfare* (1966), p. 3.[17] Thus, nationwide, over 75% of all AFDC families have established their eligibility on the basis of an absent parent, and in Texas, almost 80% have done so.[18] The effect of this obvious characteristic of AFDC-type families on the formulation of public policy has been dramatic.

Thus the original federal intervention in the public assistance field in 1935 was dominated by the "special political appeal of the aged." Steiner, p. 21. As noted by Steiner, even the order of the various titles of the Act (OAA is Title I, AFDC is Title IV) was set forth as it was because of the popularity of OAA, an attempt to draw political opposition away from the less popular proposals. Steiner, p. 20.[19] This

[17]Hereafter cited as Steiner.

[18]NCSS Report AFDC-3 (69); Findings of the 1969 AFDC Study: Data by Census Division and Selected States. Table 13. Over 40% of AFDC families both in Texas and nationwide have become eligible on the basis of a deserting father or because the father never lived in the mother's home. *Ibid.*

[19]The comparative political strength of the OAA proposal was evaluated by Edwin Witte, Executive Director of the Technical Board on Economic Security of the President's Committee on Economic Security, as follows:

view has been a factor in obtaining more liberal federal aid for state OAA programs. See Steiner, pp. 23-25, 153-54.

The political preference for OAA on the federal level merely reflects, of course, the political realities "back home." It is here that AFDC has not fared well in relation to OAA in the battle to gain public concern and consequently favorable (or at least fair) state policies.[20] Thus the Assistant Director of Program Administration for the Texas welfare

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"As the situation developed, I doubt whether any part of the social security program other than the old age assistance title would have been enacted into law but for the fact that the President throughout insisted that the entire program must be kept together. Had the measure been presented in separate bills, it is quite possible that the old age assistance title might have become law much earlier. I doubt whether anything else would have gone through at all." Witte, The Development of the Social Security Act (1962), pp. 78-79.

[20] As noted by Steiner, state policies in public assistance generally, have been dependent on the public image of the recipient. Policies are more favorable "when the image is that of a respectable, aged, white literate citizen in his 'golden years,'" and less favorable when "the image of the recipient changes to that of an uneducated, unmarried Negro mother and her offspring." Steiner, p. 3. Appendices A and B illustrate this principle and demonstrate that Texas' policies should not be viewed in isolation from discriminatory practices used nationwide. Appellants have set out in Appendix A and Appendix B to this brief, a comparison of percentages of need paid in AFDC and the "adult" programs. As of October 1970, sixteen states paid a *lower* percentage of need in AFDC than in one or more of their "adult" programs, while no state discriminated in favor of AFDC. Moreover, in seven of the sixteen states the percentage disparity between AFDC and the "adult" percentage was as great or greater than 25% (the current Texas disparity). Only in two states was the disparity greater than the 50% used by Texas in May, 1969. Of the seven states with greater than a 25% disparity, it is perhaps not coincidental that six are in the deep South (Alabama, Florida, Louisiana, Mississippi, South Carolina and Texas) and that five (including Arizona, but not Mississippi or South Carolina) are predominantly non-white in AFDC and White in OAA. Mississippi is predominantly Black in *all* programs, but the largest percentage of White recipients is in OAA, and the smallest in AFDC. South Carolina is overwhelmingly Black in AFDC and evenly divided in OAA.

department testified that "the Old Age Assistance group has had a good deal stronger voice in making its needs and concerns heard than the group of children." Gregg Dep., p. 28. The reason for this more effective voice has *not* been a more persuasive or rationally based presentation to the public or the legislature (in terms of reasons for the discrimination) on behalf of the aged citizens—it has been simply a case of who has got the votes. In Texas, the OAA recipients do.

The vast majority of AFDC recipients are children who cannot vote and are totally lacking in political power. Their mothers, poor, Black or Mexican-Americans, small in number, many of whom may not vote, hardly "count" in the ordinary political sense of things. In fact, children of AFDC represent only 2.3% of the Texas population under 18 years old. In contrast, however, the 230,000 persons on OAA (most of whom are White) constitute more than one-fourth of the population of Texas over the age 65.[21] The OAA recipients obviously do "count" in the political sense of things. When asked for a possible explanation for the nearly eight to one ratio in total state appropriations for OAA and AFDC respectively, appellee Bond, Chairman of the Board of Public Welfare, candidly attributed the comparative legislative strength of the OAA recipients to their voting power:

> "This goes into plain politics, this part does. It goes clear back to the people, not the legislature.
>
> You must remember one thing that the people do: old age assistance touches nearly every home in Texas, whether you have got a mother on it or an aunt or cousin. I have got somebody drawing old age assistance in our county alone.
>
> We have got, I think, 2,500 recipients drawing old age assistance, and they touch not every home but a wide majority of homes in Hillsboro, Dallas homes,

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[21] Texas ranks seventh nationally in this latter statistic and forty-seventh in the former. Dept. of Public Welfare, 1968 Annual Report, charts 6 and 7.

> Forth Worth homes, but we only have 88 children drawing AFDC, which doesn't cover as many homes.
>
> Legislators and politicians when they go for votes they know who has the votes, they know where the widest help is needed; and it's magnified, it's called to their attention: AFDC just doesn't touch as many people or as many places.
>
> I'm like Mr. Sarazan, I worried about all of them quite often. None of them get what they should. . . ."[22] Bond Dep., p. 18-19.

Finally, with respect to the favoritism towards the OAA program, such preference is not only a function of raw political power. The public in Texas, according to appellee Hackney, considers OAA a "pension," the *earned* right of recipients, rather what it actually is, a welfare program based on *current financial need* and not direct pecuniary contribution. Hackney Dep. pp. 71-72. OAA is identical to AFDC in this regard.[23] Better financial treatment of OAA recipients is thus in part attributable to a public "myth" of the "worthiness" of OAA recipients to receive their benefits, just as the disfavored treatment of AFDC has primarily been related, as we shall demonstrate *infra*, to a public view of those recipients as being "unworthy."

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[22]The sensitivity of Texas politics to the old age group may be demonstrated in many ways, including the exemption of the old age group from the former poll tax.

[23]Not only is the alleged distinction inaccurate in terms of the differences between needy old people and needy mothers, it is constitutionally impermissible as a basis for discrimination in a welfare program. The argument offered by appellants in *Shapiro v. Thompson, supra,* that long-term residents, having made a larger "contribution" through taxes to the community than new residents, may be the subject of favoritism in welfare benefits, is closely analogous, and was rejected by the Court. "[L]imitation of welfare benefits to those regarded as contributing to the State is [not] a constitutionally permissible state objective." 394 U.S. at 633. The Court specifically distinguished state "insurance programs which may legitimately tie the amount of benefits to the individual's contributions." 394 U.S. at 633, n. 10.

What is shocking about the emotional (but not rational) political preference for OAA vis-a-vis AFDC is not that it exists, or the reasons that it flourishes, but is appellees' unashamed admission that it is determinative of legislative action in the welfare area. Appellees' own attorney astonishingly questioned Mr. Hackney about alleged discrimination against AFDC in these terms:

Q: "Counsel has asked you several questions about prejudice against the AFDC program, discrimination against it possibly. Would you say there exists prejudice? I am talking about on a wide level rather than just isolated cases—whether we are talking about a question of wide prejudices or discrimination against a particular program, *or whether there exists more an atmosphere of preference for other programs?*

Mr. Hackney replied:

A: "I think probably the atmosphere there is the preference. Historically, this has been true. I think probably nationwide that the preference has been old age assistance.

The remarkable colloquy continued:

Q: "So if we take this on out one step further, if the Legislature of this State and the people they represent feel this way, have preference for a particular program over another one, this can even show up in the amount of money that they are going to make available to this program.

A: "Yes. As I have stated before . . . I think legislators are sensitive to the desires of their constituents, and that you will find them voting the desires of their constituents."

And finally, summing up this gross lack of sensitivity to their own participation in an irrational and politically motivated system, the Assistant Attorney General characterized the "problem" as follows:

Q: "In other words though, . . . if there has been, on the part of the legislature, any favored treatment, it's not

> because of prejudice towards one or more of those programs, as much as it is a preference for the other ones?
>
> A: "That's true. . . ." Hackney Dep., pp. 108-109.

"Preference, not prejudice," may service to assuage moral guilt; but it cannot be clearer evidence of an invidious discrimination against AFDC recipients. A state may not, of course, legislate otherwise irrational classifications in order to accommodate community sentiment or a majority of the voters. See *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736 (1964); *Cooper v. Aaron*, 358 U.S. 1, 12, 15 (1958). The record in this case, and of the last thirty years of Texas' public assistance experience, moreover, does in fact show clearly delineated prejudice against the AFDC population. This we now demonstrate.

As noted by this Court in *King v. Smith, supra*, a significant characteristic of the early ADC programs was "their preference for the 'worthy' poor." 392 U.S. at 320. Some persons "were thought unworthy because of their supposed incapacity for 'moral regeneration'." *Ibid.* Particular policies were thus developed to exclude such persons, including the so-called "suitable home" policies designed to exclude children because of their mothers' allegedly improper behavior. Those provisions came under attack in the 1940's, critics arguing, as this Court observed in *King*

> "that such disqualification provisions undermined the mother's confidence and authority, thereby promoting continued dependency; that they forced destitute mothers into increased immorality as a means of earning money; that they were habitually used to disguise systematic racial discrimination; and that they senselessly punished impoverished children on the basis of their mothers' behavior, while inconsistently permitting them to remain in the alleged unsuitable home." 392 U.S. at 321-22.

In 1945 the Social Security Board recommended the abolition of such provisions (fifteen states followed the suggestion, many others did not).

In the 1950's attempts were made in at least eighteen states to exclude children from AFDC on the basis of their siblings' illegitimate birth. See Bell, *Aid to Dependent Children* (1965),[24] pp. 72-73; *King v. Smith*, 392 U.S. at 322. Although the federal agency disapproved illegitimacy exclusions *per se* in 1960, and "suitable home" policies in 1961 (through the Flemming Ruling which required that no child be excluded from aid on the ground that his home was "unsuitable" so long as the child was still in the home), "substitute parent" regulations—having the same purpose and exclusionary effect—were put into operation by many states. It was the latter regulations which the Court ruled in conflict with the Act in *King*. Observers have concluded that these policies represented a national "trend" of hostility to AFDC mothers and children. See, *e.g.*, Bell, *passim*.

Texas was a prime and vigorous perpetrator of these irrational and counterproductive measures taken against the would-be eligibles for AFDC and against AFDC recipients. Texas was not one of the States which, on HEW recommendation, ended its "suitable home" policy exclusions. That policy was not modified until after the Flemming Ruling in 1961. See Defendants Answers to Written Interrogatories, Ex. I. Texas was one of the eighteen states which, as noted by the Court, attempted to exclude children on the basis of their siblings' birth status. See Bell, *supra*. Texas enacted and enforced one of the nation's most unfair "substitute parent" regulations (which was enforced until shortly after the Supreme Court ruled such regulations illegal, giving rise to the Texas decision to cut AFDC benefits, see *infra*). The Texas regulation required only that there be "ongoing relationship" between a man and a woman "bearing a resemblance to a husband and wife relationship." Where such "a resemblance" was found, all children of the woman were ineligible even though the man was not supporting them, owed them no duty of support and, often, could not support them if he wanted to do so. See Defendants Answers to

[24] Hereafter cited as Bell.

Written Interrogatories, Ex. I. And, of course, the regulation was enforced to exclude thousands of needy children in the loose and wild manner which the language of the regulation encouraged.[25]

The "social prejudice" against AFDC in Texas, as reflected in the state's use of the restrictive eligibility conditions discussed above, is largely intertwined with racial attitudes which are held by the public and which undoubtedly influence the legislature. Both "suitable home" and "substitute father" policies were favorite devices in many states for restricting access to the welfare programs to Whites. See Bell, pp. 175, 181, 186, and *Smith v. King*, 277 F.Supp. 31 (M.D. Ala. 1967), note 7 and *King v. Smith*, 392 U.S. at 321-22.[26] Texas was no exception.

Thus Bell notes that Texas made particularly effective use of "substitute parent" policies to keep illegitimate children

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[25]Thus, for example, in *Rios v. Hackney*, 294 F. Supp. 885 (N.D. Tex. 1967), the court reinstated a needy mother and her unfortunate children to the AFDC rolls on the ground that the decision removing her was so utterly lacking in evidence as to violate the Due Process Clause.

[26]Bell describes this as follows:

> "The long history of 'suitable home' policies has been examined in the effort to isolate their *actual as well as their publicly avowed functions.* The evidence shows that their primary functions were (1) to restrict the growth of the caseload and (2) to inhibit ADC coverage of Negro and illegitimate children who because of their family composition were more apt to qualify than were white children with two able-bodied parents in the house." Bell, p. 175 (emphasis added).

With regard to substitute father rules, Bell also notes that their effect "eventually fell most heavily on Negro families." Bell, p. 186. She noted that

> "The greater difficulty experienced by Negro men in their efforts to support families, the relatively higher risk of marital instability, the scarcity of free legal services for assistance in regularizing marital status, all guarantee that welfare policies of this nature will victimize Negroes most heavily, particularly in the South." *Ibid.*

off the rolls. Bell, p. 223, n. 32.[27] In 1960, more than sixty percent of the illegitimate births were non-white. HEW, Public Health Service, National Center for Health Statistics, "Trends in Illegitimacy, United States–1940-1965," Table 3. This proportion is further exaggerated by the fact that the Black illegitimate children are more likely to have to apply for public assistance for their subsistence. Adoption, a likely prospect for over 30% of illegitimate births in 1961, HEW, Bureau of Family Services, "Illegitimacy and Dependency," p. xxiii (reprinted from HEW *Indicators*, September 1963), is recognized to be much more difficult for Blacks in Texas than it is for Whites, Sarazan Dep., pp. 59-60, and thus recourse for Black unwed mothers to public aid to care for their children is more likely. *Ibid.*

The removal of "suitable home" and "substitute parent" policies in Texas has, clearly, not improved the deep social prejudices held by the public and legislators against AFDC recipients on the ground that they are "unworthy." These social prejudices and their consequences for appropriations for AFDC were made clear by appellee Hackney in his deposition herein. Thus Mr. Hackney testified that there are numerous "myths" about the people on AFDC, that he has talked to people trying to "explode" the myths, that "people do think AFDC rewards illegitimacy" although he denies that it does. Hackney Dep., pp. 47-48.[28]

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[27] According to Bell, as late as 1958 Texas did not require a father to support his illegitimate children. *Ibid.* She quotes the Texas Research League as reporting in 1959 that "the problem is complex for if the mother is forced to support her children and is not equipped to take a job or cannot find one, she will increase her income through attention to men. . . ." *Ibid*, citing Texas Research League, Children's Services of the Texas Department of Public Welfare, Report No. 1 (1959), pp. 64-65.

[28] Indeed, such "myths" as those in Texas have so disturbed the federal agency, that it has recently distributed nationwide a booklet directed at refuting with *facts*, the various irrational prejudices expressed against AFDC recipients. HEW, Social and Rehabilitation

5. *The Texas Dual Welfare System Has Consistently Resulted in Significantly Lower Benefits for AFDC Recipients in Relation to Their Needs Compared to Benefits in the "Adult" Categories*

Reduced payments for AFDC recipients while other programs continue at the same or better payments has not been unusual in the Texas dual welfare system. Thus in the three years immediately preceding the decision below, maximum grants[29] were *increased* three times in OAA while grant maximums in AFDC were reduced twice in the year preceding the decision. Compare the Dept. of Public Welfare 1968 Annual Report, p. 3 with Memorandum E-417 and E-434. Since the state constitution was amended in 1965 to remove ceilings on appropriations for each individual category, and to replace that with an overall ceiling, payments have *never* been reduced in any of the adult categories. We are not suggesting that AFDC payments have never been increased, but rather that AFDC *always* bears the brunt of budgetary crises. Consider the course of the past twenty-two years with regard to reductions in payments in each of the four programs.

Service, "Myths vs. Facts" (SRS) 71-127 (1971). The "myths" challenged included the following:

(1) "Welfare families are loaded with kids—and have more just to get more money";

(2) "Give them more money and they'll spend it on drink and big cars";

(3) "Most welfare children are illegitimate";

(4) "Welfare people are cheats";

(5) "The welfare rolls are full of able-bodied loafers."

[29] Prior to adoption of the new budgetary system, payments were limited by a maximum grant in *all* categories.

Reductions in Payments from 1948 to Mid-1969 (57-62):

PROGRAM	NUMBER OF TIMES PAYMENTS REDUCED, THROUGH USE OF PERCENTAGE REDUCTIONS, FLAT REDUCTIONS OR REDUCTIONS IN MAXIMUM GRANTS
OAA	Five times
APTD	None
AB	Five times
AFDC	Eighteen times

Moreover, the greatest OAA reduction over this period has been $1 per recipient (59), and the greatest in AB, $3 (61). In AFDC, however, across the board reductions have been as high as 16% per family and $16 per family (62). Of course the new method has imposed the greatest reduction ever.

It is also significant that prior to the elimination of AFDC maximums in 1969, the maximum grant limitations were especially more burdensome in AFDC than the adult categories. As noted in the Statement of the Case, *supra*, only 43.6% of AFDC recipients were able to meet their needs in full under the low maximum which was in effect, while 91.8% of OAA recipients, 74.4% of APTD recipients, and 72.4% of AB recipients were able to have 100% of their needs met because of a relatively high maximum. Further, it is worth noting that the family AFDC maximum was *particularly* burdensome to Black and Mexican-American families which were usually larger than White AFDC families and so affected by the maximum, see Stipulation Nos. 38, 39 (74), a fact well known to appellees, Hackney Dep., p. 5.

Finally, the budgetary procedures instituted in May, 1969 illustrate perhaps best of all the dramatic discrimination against AFDC recipients. As of that date, appellees met 100% or 95% of "needs" in the "adult" programs (subject to certain maximums which are sufficiently high so as to prevent few families from reaching the 100% or 95%

levels), and only 50% in AFDC. The overall effect on AFDC checks was as follows:

EFFECT OF FIFTY PERCENT SYSTEM[30]	NUMBER OF FAMILIES
Checks reduced	22,812
Checks increased re remaining the same	approximately 14,000
Grants entirely eliminated	2,472[30a]

It is obvious from all of the above, that far from implementing the common purposes of the public assistance programs, Texas has made a deliberate and consistent effort to use AFDC as the "whipping boy." A budgetary example using the 50% reduction in effect at the time of the decision below will best illustrate our claim.

TABLE I

AGED COUPLE, BOTH RECEIVING OAA, AND RESIDING IN PUBLIC HOUSING AT THE MAXIMUM ALLOWABLE RENT

Personal needs:	
2 adults (*$65 each*)	$130
Shelter	$ 42
Total Monthly Needs	$172

Payment: $172, or 100% of needs.

[30] Stipulation No. 60 (80).

[30a] These 2,470 are also included within the 22,812 listed as having their checks reduced.

TABLE II

MOTHER AND THREE MINOR CHILDREN, ALL RECEIVING AFDC, AND RESIDING IN PUBLIC HOUSING AT THE MAXIMUM RENTAL ALLOWANCE

Personal needs:	
Mother	$ 65
3 children *($25 each)*	$ 75
Shelter	$ 42
Total Monthly Needs	$182

Payment: $91, or 50% of needs; unmet monthly needs of $91.

Thus as Tables I and II graphically demonstrate, families with almost identical monthly needs ($172 for the OAA aged couple and $182 for the AFDC family of four) are provided welfare assistance so grossly disparate that they seem to defy rational justification.

TABLE III

SINGLE ADULT RECEIVING OAA, RESIDING IN PUBLIC HOUSING AT THE MAXIMUM RENTAL ALLOWANCE

Personal needs	$ 65
Shelter	$ 36
Total Monthly Needs	$101

Payment: $101, or 100% of needs.

TABLE IV

MOTHER AND FOUR MINOR CHILDREN RECEIVING AFDC AND RESIDING IN PUBLIC HOUSING AT THE MAXIMUM RENTAL ALLOWANCE

Personal needs:	
Mother	$ 65
4 children *($25 each)*	$100
Shelter	$ 49
Total Monthly Needs.	$214

Payment: $107 or 50% of needs; unmet monthly needs $107.

If the first two examples alone are not persuasive of the irrationality of appellees' determination of grants, the last two are conclusive. Thus, a one person OAA household receives a monthly grant almost equal to that available to a *five* person AFDC household with *twice* the determined needs.[30b] Appellants believe these tables speak for themselves as to the callousness of Texas' policies.

[30b] The utter irrationality of the welfare payment structure in Texas is well illustrated by the following example. An AFDC mother and her minor child are determined to "need" $132 monthly. They would receive at the most $66 per month (and medical assistance). If the child is forced to live with his 65 year old grandmother (because of some misfortune to his mother, for example), the benefits of the concededly *equally* needy ($132) household would be either $119.50 or $132. The result would depend on whether or not the child is considered to be a dependent of an OAA recipient, or an AFDC recipient himself with a non-AFDC caretaker. In the latter situation his portion of the "needs" budget is reduced by the appropriate percentage (50%), while in the former it is maintained at 100%. The needs of this child are *identical* in each case, but the payment determination is made on the basis of a label, *i.e.*, is the child receiving AFDC? To further complicate matters, if the grandmother chooses the route which would gain $12.50 per month, the child is *ineligible* for medical assistance since he is not himself a *recipient*, Chapman dep., p. 29, but if the family accepts the reduction and considers the child an AFDC recipient, he gets *full* medicaid coverage.

The consequences of this sharp differentiation in the percentage of needs met in AFDC as compared to the "adult" programs are dramatic in human terms. Texas' need standards define far from an adequate and comfortable living, but rather provide an AFDC family only the bare rudiments of survival. The hardship created by payment of aid in amounts far less than such determined need does not require extensive elaboration. The following colloquy between the Secretary (John Gardner) and Under Secretary (Wilbur Cohen) of HEW and a former Secretary, Senator Ribicoff, provides a good summary, however:

Senator Ribicoff:	What happens to the child or the adult who receives so much less than what you consider a proper standard? How do they live?
Mr. Cohen:	They have to live on the lesser amount.
Senator Ribicoff:	How do they live?
Mr. Cohen:	They have to cut back on their food and clothing and other needs to live on the amount that the State gives them.
Senator Ribicoff:	Well, is not a study made or do you know what happens to these people? I mean just what is happening to them?
Mr. Cohen:	Well, I think that the evidence shows—I do not have it immediately before me—that many of these children and these families grow up without adequate food, without adequate medical care, and certainly their whole aspirations for improving in their education status are stunted, and I think that the evidence from the State administrators when you hear them will bear that conclusion out.
Secretary Gardner:	It shows up most clearly, I think, in the medical data. You will find a higher incidence of just about every kind of medical disorder and physical handicap in these youngsters—malnutrition and everything else.

Senator Ribicoff: Well, in looking to the cost to society ultimately, the people who are below standard cause a greater drain eventually upon what the society has to pay out in every conceivable way, is that not right?

Secretary Gardner: No question about that, Senator.

Hearings on H.R. 12080, Comm. on Finance, 90th Cong., 1st Sess., August 22, 1967, pp. 258-259.

B. The Substantial Differential In Percentage Of Needs Met Has The Effect Of Disproportionately Burdening Politically Powerless Blacks And Mexican-American Recipients Of Public Assistance, And Thus Must Be Invalidated Absent A Demonstration By Appellees Of A Compelling Interest In Maintaining The Discrimination

Appellants do not claim that any classification may be voided as racially discriminatory upon simple demonstration of (1) different treatment of two groups and (2) a higher incidence of Black-Americans and Mexican-Americans in the disfavored group. Many such classifications would doubtless be valid bases for governmental action. Appellants rather make the much more limited claim that racial discrimination exists here because:

(1) the State has imposed more onerous burdens on a class which is traditionally victimized by social prejudice, which has little political power, and which is overwhelmingly Black and Mexican-American, than upon a similarly situated class which has much more political power, and which is substantially White-Anglo;

(2) the differential racial impact of the measures is well known to the State;

(3) no persuasive justification for the measure has been offered by the State, nor is there one; and

(4) the interest affected is one of fundamental importance to the health and livelihood of the persons involved.

Appellants urge that the showing below was sufficient to have required the district court to apply the more rigorous

standard of review usually applied to racially discriminatory classifications. The district court, however, held that appellants "failed to make a sufficient showing of racial or ethnic discrimination." 304 F. Supp. at 1339. An analysis of the court's reasoning, and of the facts upon which it specifically relied to reach its conclusion, will demonstrate that the court had a fundamental misunderstanding of the tests which this Court has established to guard against racial discrimination perpetrated by state officials.

Appellants have already described the grossly disproportionate burden placed upon Blacks and Mexican-Americans by the state's percentage reduction policy. To sum it up, it is clear that in all "adult" programs, White-Anglos are the majority. In contrast, 8 out of every 9 AFDC recipients are either Black or Mexican-American. When the one large "adult" program is considered, the White-Anglo majority goes up dramatically. Were one to average all "adult" programs together, the percentage of White-Anglo recipients would still be nearly 2 out of 3. Appellants have also established a long history of disfavored treatment by the Legislature with respect to financing the AFDC program, and a clear legislative "preference" for the OAA and other adult programs, and a policy of restricting access by Blacks to the welfare programs by use of rules which were unrelated to financial need, and which primarily functioned to keep as many Blacks as possible off the rolls. Taken together, a *prima facie* case of racial discrimination has been made.[31]

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[31] Two other courts have found no *prima facie* racial discrimination in the payment of a lower percentage of need in AFDC after analyzing the racial composition of each category. The record in this case is substantially better, however. Thus, in *Ward v. Winstead*, 314 F. Supp. 1225 (N.D. Miss. 1970), *appeal dismissed* 400 U.S. 1019 (1971), the court stressed that "while . . . there is a disparity in the percentages of recipients by race under the different programs, nevertheless the majority race under *all* programs is the Negro race." 314 F. Supp. at 1235 (emphasis added). Likewise in *Lampton v. Bonin*, 299 F. Supp. 336 (E.D. La. 1969), the court emphasized that "although it is true that a greater percentage of the ADC recipients are Negro, this does not change the fact *that a majority of the recipients in all*

It is of course no roadblock to appellants' claim that the statutes and regulations which we challenge do not overtly define the disfavored class in terms of race. This Court has specifically recognized that a state welfare statute which is "infected with a racially discriminatory purpose *or effect*" would be "inherently suspect" and subject to a rigid judicial review. *Dandridge v. Williams, supra,* 397 U.S. at 385, n. 17 (emphasis added). Thus even a regulation or statute neutral of its face, as in *Dandridge* and the present case, would be unconstitutional if either its natural effect or its administration, see *Yick Wo v. Hopkins,* 118 U.S. 351 (1996), resulted in discrimination against ethnic minorities. See also *Patton v. Mississippi,* 332 U.S. 463 (1947). Just last term, in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), this Court held, for example, in an action arising under Title VII of the Civil Rights Act of 1964, that whether an employer intended to discriminate on the basis of race when he instituted certain standards for promotion was irrelevant. If the exclusionary *effect* of the employment practice was greater with regard to Black as opposed to White employees, the Act was violated. Moreover, once such a discriminatory effect was established, the burden fell on the employer to provide a valid business justification for the practice.[32] And in another

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the non-OAA categories are Negroes," and that in the OAA category only "52% of its recipients—no more than a bare majority—are white." 299 F. Supp. at 344 (emphasis added). In this case, the significant programs in size, AFDC and OAA (and to a lesser extent APTD), were burdened or favored in direct proportion to the percentage of Blacks and Mexican Americans in the programs.

[32]Although *Griggs* arose under Title VII, its standard is equally applicable in a case arising directly under the Fourteenth Amendment. Thus, in cases involving discrimination in public employment where only Fourteenth Amendment rights were asserted, it has been held that purposeful intent to discriminate on the basis of race need not be alleged or shown, *Penn v. Stumpf,* 308 F. Supp. 1238 (N.D. Cal. 1970); *Chance v. Board of Examiners,* 330 F. Supp. 203 (S.D. N.Y. 1971), and that the burden of justifying the employment practice in non-racial terms shifted to the defendant. See especially *Chance v. Board of Examiners, supra.*

case last term, *Palmer v. Thompson*, *supra*, which involved the question of whether the closing of public swimming pools in order to avoid their desegregation violated the Fourteenth Amendment, this Court held that it did not since the record did not establish "state action affecting Blacks differently from Whites." 403 U.S. at 255-56. The Court specifically noted that

> "the focus of [*Griffin* and *Gomillion*][33] was on the actual effect of the enactments, not upon the motivation which led the states to behave as they did." *Ibid.*

The district court, however, relied on its finding that "the defendant did not know the racial makeup of the various categories prior to or at the time when the orders here under attack were issued." 304 F. Supp. at 1340. The court obviously believed that proof of discriminatory *intent* was necessary in order for appellants to prevail. We have three separate responses. First, the unequal treatment in this case, when considered against the long history of discrimination against AFDC recipients through "substitute parent" and other devices, all of which primarily affected Negroes and Mexican-Americans, would reasonably permit an inference of an intent to discriminate racially. Moreover, we find it incredible that welfare officials and caseworkers—with a duty of interviewing all recipients—would not have a general notion of the different racial composition of the program. Indeed, in his testimony taken on May 1, 1969, appellee Hackney explained that the new budgeting policy instituted that day would primarily benefit the minority groups since they tended to make up most of the larger family units, those particularly hurt by the prior system of maximum grants. Hackney deposition, p. 83: How did the State Director know this fact if he was unaware of the racial composition of his welfare programs? Second, appellees know of the discrimination *now*, but they have not remedied it, over

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[33] *Griffin v. Prince Edward County*, 377 U.S. 218 (1964); *Gomillion v. Lightfoot*, 364 U.S. 399 (1960).

two years since the court's decision.[34] Finally, and clearly most importantly, the *motive of state officials is constitutionally irrelevant.* As we have shown, it is the result or effect of their conduct that matters. Since this principle is crucial to an understanding of the nature of the discrimination under attack here, we set out in some detail the reasons this Court refuses to look at motivation in analyzing classifications under the Fourteenth Amendment.

1. Motivation is hard to prove. Those who would discriminate today on grounds of race are the beneficiaries of considerable sophistication in the art, which has advanced since the days of the Black Codes. Racial distinctions no longer appear on the face of laws or regulations, and discriminators no longer overtly profess that their decisions are racially based. As noted in *Palmer*, "[I]t is difficult or impossible for any court to determine the 'sole' or 'dominant' motivation behind the choice of a group of legislators." 403 U.S. at 225.[35]

2. "Equal Protection of the Laws" should protect Blacks and other minority groups against irrational and thoughtless racial discrimination as well as intentional discrimination. The Second Circuit summed it up in *Kennedy Park Homes Association v. Lackawanna*, 436 F.2d 108 (2d Cir. 1970), *cert. denied*, 401 U.S. 1010 (1971) as follows:

> "Even were we to accept the allegation that any discrimination resulted from thoughtlessness rather than a purposeful scheme, [the state] may not escape

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[34] The district court relied in part on the fact that appellees promised to remedy the differential in percentages upon passage of a Constitutional amendment permitting an increase on welfare spending. 303 F. Supp. at 1340. The amendment passed, and the discrimination persists. Appellants discuss this *infra* in our analysis of the district court's findings.

[35] It was just this consideration, coupled with a realistic appreciation of the impossibility of extracting an admission of discrimination from the covert discriminators, that led to this Court's development of the doctrine that a *prima facie* showing of discrimination *can* be made objectively and statistically. See *infra*, p. 51.

responsibility for placing its Black citizens under a severe disadvantage which it cannot justify." 436 F.2d at 114.[36]

3. The ordinary political processes cannot be relied upon to protect the poor and minority groups from discriminatory legislation, since such "discrete and insular minorities" play little role in that process. Cf. *United States v. Carolene Products*, 304 U.S. 144, 152-53, n. 4 (1938)[37] and *Graham v. Richardson*, 403 U.S. 365, 372 (1971). Thus, appellees themselves urge that the legislation here challenged may be attributed to legislative "preference" for the OAA program, and to the voting power of aged recipients. It may well be that a majority of legislators are not "anti-Black" or "anti-Mexican," but in voting the interests of their very vocal (and White) constituents they may well do as much harm to those individuals as if they intended the result.[38]

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[36] See also *Hawkins v. Shaw*, 437 F.2d 1286 (5th Cir. 1971); *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F.2d 970 (2d Cir. 1968); *Hobson v. Hansen*, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hansen*, 408 F.2d 175 (D.C. Cir. 1969).

[37] "Prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied on to protect minorities, and which may call for a correspondingly more searching judicial inquiry." 304 U.S. 144, 152-153, n. 4.

[38] Judge Wright stated the problem in *Hobson* as follows:

> "Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and racial minorities are involved. For these groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to pay little heed to even the deserving interests of a politically voiceless and invisible minority. These considerations impel a closer judicial surveillance and review of administrative judgments adversely affecting racial minorities and the poor, than would otherwise be necessary." 269 F. Supp. at 507-508.

4. If legislative motive were a key to a finding of racial discrimination, the legislature could quickly remedy the "problem." This Court, again in *Palmer*, noted that

> "there is an element of futility in a judicial attempt to invalidate a law because of the bad motives of its supporters. If the law is struck down for this reason, rather than because of its fiscal content or effect, it would presumably be valid as soon as the legislature or relevant governing body repassed it for different reasons." 403 U.S. at 225.

In short, Texas' welfare policies must be analyzed in terms of how they affect recipients, not in terms of the lack of overt bias on the part of state officials. As long ago as 1935 this Court recognized that mere protestations of good faith cannot destroy a *prima facie* case of discrimination, for otherwise the 14th Amendment "adopted with special reference to their [Black citizens] protection—would be but a vain and illusory requirement." *Norris v. Alabama*, 294 U.S. 587, 598 (1935). The district court neglected to apply this principle in reaching its decision.

Finally, appellants' reliance on statistical evidence to establish their *prima facie* case of racial discrimination is not unusual. The rule that statistical evidence of unequal treatment of racial minorities may be used to prove the constitutional infirmity of a policy which is on its face neutral, has been applied many times by this Court. See, e.g., *Turner v. Fouche*, 396 U.S. 346 (1970); *Green v. School Board*, 391 U.S. 430 (1968); *Sims v. Georgia*, 389 U.S. 404 (1967); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Jones v. Georgia*, 389 U.S. 24 (1967); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Hernandez v. Texas*, 347 U.S. 475 (1954); *Eubanks v. Louisiana*, 346 U.S. 584 (1958); *Norris v. Alabama*, 294 U.S. 587 (1935); cf. *Griggs v. Duke Power Co.*, *supra*.[39]

[39] A few examples will be helpful. Thus in *Jones* the Court held a case of discrimination made out *solely* on the basis of statistical disparities between the percentage of Negro taxpayers and the percentage of Negroes on the jury list and box. In *Whitus*, the Court found that the disparity between the percentages of Negroes on the tax digest (27.1%), on the grand jury venier (9.1%), and on the petit jury

We believe that whenever it appears that a particular minority is substantially underrepresented in a group receiving favored treatment under state laws or practices, and overrepresented in a group receiving less favored treatment, particularly when such treatment comes in the context of a long history of discrimination, the inference must be drawn that the state is drawing the racial line unless it offers a compelling justification for the differential in treatment, a showing which must of course rely on non-racial factors. See generally for a good discussion on this question, Fessler and Haar, "Beyond the Wrong Side of the Tracks: Municipal Services in the Interistics of Procedure," 6 Harv. Civil Rights, Civil Liberties L. Rev. 441 (1971). "[F]igures speak, and when they do, Courts listen." *Brooks v. Beto*, 366 F.2d 1, 9 (5th Cir. 1966); *Hawkins v. Shaw, supra.* See also *Alabama v. United States*, 304 F.2d 583, 586, (5th Cir.), *aff'd.* 371 U.S. 37 (1962). The lower court failed to listen, but instead relied on evidence which supported *at best* a finding of good faith, at worst, an inference of bad faith, and in any case, failed to rebut in any way appellants' factual presentation.

The district court's analysis of the record was taken entirely out of context, and demonstrated a misunderstanding of the issue before it. It will be helpful to consider each piece of evidence upon which the court relied. First, however, it is well to point out that the court's mistaken reliance on legislative motive is not evidenced merely by its articulation of this theory in finding number 11, 304 F.

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venire (7.8%) was indicative of discrimination noting the mathematical probability of such disparities occurring by chance. The *Turner* case is particularly instructive here. In *Turner*, and in its companion case, *Carter v. Jury Commissioners of Green County*, 396 U.S. 320 (1970), the Court held that standards that jurors be intelligent and upright were not unconstitutional on their face, since they were racially neutral and capable of fair administration. However, in *Turner*, in the application of these standards, 96% of those rejected in a revision of the jury lists were Black. The court held that such a showing of a racially disparate impact in the administration of the standard cast the burden on the state of providing a constitutionally acceptable reason for the result.

Supp. at 1340. In reviewing the court's findings, we ask this Court to note how each and every finding represents *only* evidence of "good faith." None of the facts relied upon by the lower court demonstrate an absence of discriminatory effect, or provide a justification for that effect.

Finding numbers 1, 2 and 3: The district court considered it relevant that the legislature has never reduced the total amount of money appropriated for AFDC, and since 1943 had increased total funding five times, and since 1959, twice. This case does not involve an abstract challenge to line items on a budget, however. It involves children, and the level of their subsistence grants. It is of no concern to them, nor does it cure the discriminatory action taken against them *as individuals*, that the "category" of AFDC has not itself been reduced. The facts as set out above are that actual AFDC grants to families have been reduced eighteen times since 1948 in response to fiscal emergencies, compared to only 5 for OAA, and not a single OAA recipient has suffered a reduction in grant since 1965, when the legislature was first authorized by the Constitution to appropriate as much as it wanted to for each category (as long as *total* assistance expenditures did not exceed the ceiling).

Finding numbers 4 and 5: The district court observed that since 1943, AFDC appropriations have increased 410% compared to an increase of 211% for OAA and 200% for AB and, since 1963 AFDC appropriations increased 58% compared to 13% in OAA and 183% in APTD. Here again the court mistakingly dealt with the discrimination in terms of total state funding rather than its impact on the individuals involved. The differential in rate of increase of appropriations at best indicates a different rate in growth of the respective programs, rather than relatively fairer treatment to AFDC recipients. Indeed, the figures ignored by the lower court revealed that since 1943, while OAA appropriations doubled, the number of OAA recipients increased only by one-third, whereas the percentage increase in AFDC appropriations was almost matched by the increase in num-

bers of recipients.[40] Moreover, since 1963, when total OAA appropriations increased by 13%, the OAA population remained virtually static, whereas AFDC appropriations again merely kept pace with the increase in program growth.[41]

Finding 6: The district court congratulated appellees for abolishing the maximum grant system on May 1, 1969, and in the process raising grants for those "large family groups receiving AFDC assistance grants [who] are predominantly Negro and Mexican-American." 304 F. Supp. at 1340. First, this is double-think at its best—evidence of the elimination of one aspect of prior racial discrimination has been used to rebut a charge of discriminatory conduct which was the result of that change. Moreover, the maximum was abolished precisely because appellees, under threat of a court order, believed it to be unconstitutional.[42] To argue, in such a context, that the adoption of the 50% reduction in AFDC in place of the maximum rebuts our constitutional attack is nonsense.

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[40]Stipulation 51a (78) indicates that the number of OAA recipients increased by 33.5% since 1944, while AFDC grew by 310.3%, a rate of growth almost ten times that in OAA, compared to an appropriations growth only twice OAA's.

[41]Stipulation 53a (79) indicates that since 1964 the OAA rolls have expanded by only 0.024%, compared to a 62.7% increase in the AFDC rolls.

[42]Appellee Sarazon testified that "a number of lawsuits throughout the United States . . . have been recently decided in a manner that would indicate that it will be compulsory quite soon, if indeed it is not now, to recognize the children individually . . . . Sarazon Dep. p. 37. The 1969 Annual Report of the Department of Public Welfare specifically states at page 4:

> "The Department's elimination of the maximum grant limitation in AFDC, effective May 1, 1969, came while a suit challenging the validity of the maximum grant method was pending in a U.S. District Court in Houston (*Robinson v. Hackney*) and was made in anticipation that this would become a new Federal requirement."

Finding numbers 8 and 9: The district court, in an exercise in wishful thinking, relied upon a promise by the state to raise AFDC grants to 100% of need if a then pending Constitutional amendment were approved by the voters. The amendment would have raised the constitutional ceiling on total public assistance appropriations from $60,000,000 to $80,000,000. Expected appropriations increases were to be $15,000,000 as a result, and $11,900,000 of that amount to the AFDC program. The amendment did, in fact, pass, but AFDC grants were only raised to a maximum of 75% of need, and thus the discrimination continues.[43] Moreover, the $4,000,000 increase in "adult" appropriations was sufficient to *raise* many OAA, AB and APTD grants, since simultaneously with the increase to 75% of need in AFDC, OAA, AB and APTD maximum grants were raised $14-$16 per month. See Texas Department of Public Welfare, Annual Report, 1970, p. 2.

Even if it is assumed (which appellants do not in light of the above facts) that the recent allocation of newly appropriated funds was not by itself racially discriminatory, that would not be sufficient to excuse the continuing discrimination in the percentage of needs met in the various programs. A rational classification is "insufficient in itself to meet constitutional standards if its effect is to freeze-in past discrimination." *Henry v. Clarksdale Municipal Separate School District*, 409 F.2d 682, 688 (5th Cir. 1969); *Hawkins v. Shaw, supra. Cf. McDaniel v. Barresi*, 402 U.S. 39 (1971); *Board of Education v. Swann*, 402 U.S. 43, 46 (1971); *Green v. County School Board*, 391 U.S. 430 (1968). The legislature has merely freezed in the results of past discrimination. Thus, AFDC appropriations which have been disproportionately low in relation to the relative sizes of the various programs, formed the base upon which the "new money" was added. If the present Texas Constitution placed

[43] This proves the fallacy of looking at modifications in total expenditures without analyzing the impact on actual grant levels.

a ceiling on AFDC appropriations as it once did for all the categories, one might sympathize with (but not condone) the legislature's predicament. But the legislature now has complete power to reallocate total public assistance appropriations in order to rationalize the distribution of those funds.[44]

Finding number 10: The district court was also persuaded by the fact that recipients in the AB program were being paid 95% of need, and were majority Black and Mexican-American (54.2% Black and Mexican-American and only 44.3% White-Anglo). 304 F. Supp. at 1340. These pale by comparison to the figures for the AFDC programs (87% Black or Mexican-American; 13% White-Anglo). It should be emphasized that there are only 4,154 AB recipients, stipulation 26 (71), little more than one percent of the total welfare population in Texas. Moreover, blind recipients hardly suffer from the social prejudice which has traditionally been the lot of the broken families receiving AFDC.

There can be no real dispute as to the content of the review required should this Court agree with appellants that a *prima facie* case of racial discrimination has been made.

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[44]Appellee Bond testified that if the Legislature appropriated a single amount (which it may do) for distribution by appellees, the percentage control factor will "go across the board on all categories." Unfortunately Mr. Bond didn't anticipate that happening very soon. Bond Dep., p. 29. The Legislature's real reason for not reallocating the funds in order to better rationalize the Texas public assistance program may well be, in addition to the usual political "preference" for OAA, a concern that such a reallocation will injure many needy OAA recipients, who have traditionally received 100% of need and are used to receiving a certain grant level. This "reason" does not withstand scrutiny. First, OAA grants have actually been increased in recent years. Second, since the OAA program is significantly larger than the AFDC program, a very *small* percentage reduction in OAA payments will permit a concomitantly large increase in the AFDC percentage, and a levelling off at a relatively high payment level. Lastly, tradition or custom cannot legitimize a course of conduct which by itself otherwise offends the 14th Amendment. See *Eubanks v. Louisiana*, 356 U.S. 584 (1958).

Because of the Fourteenth Amendment's overriding purpose to secure racial equality, "racial classifications [are] 'constitutionally suspect' . . . and subject to the 'most rigid scrutiny' . . . *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Bolling Sharpe*, 347 U.S. 497, 499 (1954). Official conduct which discriminates along racial lines thus bears a "very heavy burden of justification." *Loving v. Virginia*, 388 U.S. 1, 9 (1967).

This Court has required a two-part test to be followed in reviewing a state statute under this rigorous standard. First, the particular classification must be necessary to achieve a permissible state objective, and second, the state objective allegedly furthered by the statute must satisfy a *compelling state interest*. See, *e.g.*, *Graham v. Richardson*, 403 U.S. 365 (1971); *Kramer v. Union Free School District*, 395 U.S. 621 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1968); *McLaughlin v. Florida*, *supra*; *Loving v. Virginia*, *supra*; Michelman, *The Supreme Court 1968 Term—Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 20, 34 (1969).

If the district court had applied this standard the substantial percentage disparity could not have passed muster. The justifications hypothetically offered by appellees in support of the discrimination were not demonstrated to have been in fact relied upon by the state as a basis for establishing the discrimination, nor was the percentage disparity shown to be necessary to accomplish any compelling state interest. See *Shapiro v. Thompson*, *supra*; Fessler and Haar, *supra*, 6 Harv. Civil Rights Civil Liberties L. Rev. 441, 444-45. The asserted justifications are, in appellants' view, so utterly irrational, and ill-suited to service any proper objective of the Texas Public Welfare Act of 1941 or the Social Security Act, that we deal with them in section C, *infra*, in our discussion of the traditional equal protection test.

In sum, then, appellants do not contend that Texas may not reduce welfare payments to eligible recipients, nor do

they contend that a desire to conserve funds may not justify payment of less than 100% of need to all recipients. Their plea to this Court is simply that absent a compelling justification, Texas may not accomplish such a reduction in payments in a manner which is grossly discriminatory to Black and Mexican-American recipients. They contend that if Texas wishes to cut welfare costs, it may do so in a way which does not have the effect of singling out racial and ethnic minorities for hunger and malnutrition.

C. The Payment Of A Lower Percentage Of Determined Need To AFDC Recipients Than To OAA Recipients Is Not Rationally Related To Any Purpose Of Either The Texas Public Welfare Act Or The Social Security Act

Appellants are well aware that nothing in the Fourteenth Amendment deprives Texas "of the power to treat persons in different ways." *Reed v. Reed*, 40 U.S.L.W. 4013, 4014 (Nov. 22, 1971). Thus, the mere fact that AFDC recipients are affected differently by Memoranda E-430 and E-434 (setting the percentage reduction in AFDC and maintaining OAA at 100% of need) does not *per se* render the practice invalid. See *Kotch v. Board of River Port Pilot Commissioners*, 330 U.S. 552, 556 (1947). It is settled beyond serious contention, however, that state classifications do violate the equal protection clause when they do not "rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed," and when they are "made arbitrarily and without such bases." *Gulf, Colorado and Santa Fe Ry. v. Ellis*, 165 U.S. 150, 155 (1897). This principle has received consistent application by this Court, most recently in *Reed v. Reed*, *supra*:

> "The Equal Protection Clause . . . [denies] to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated

to the objective of that statute." 40 U.S.L.W. at 4014.[45]

The question presented by this case, then, assuming the Court does not find a *prima facie* case of racial discrimination, is whether the payment of 50% of monthly subsistence needs (as determined by the state) to one group of needy and dependent welfare recipients, and 100% of the monthly needs to another group of needy and dependent recipients based solely on the *source of their dependency*, not the extent of their need, is "rationally based," *Dandridge v. Williams, supra*, 397 U.S. at 487, in light of the purposes of the Texas public assistance program.

The central purpose of any public assistance program is to relieve acute financial need. Texas' program is no exception. Thus, as noted above in Point I, section A, the general purpose clause of the Texas Public Welfare Act of 1941 describes the legislative intent as the creation of a "program of social security." Art. 695c, §35. Each and every category of assistance defines as the target of its benefits individuals who do not have "sufficient income or other resources to provide a reasonable subsistence compatible with decency and health." Art. 695c, §12(5) [AB]; §16-A [APTD]; §17 [AFDC]; §21 [OAA].[46] The various Social Security Act titles which provide the source for more than two-thirds of Texas' public assistance funds, also state as their uniform purpose the provision of financial assistance to needy individuals. See 42 U.S.C. §§301, 601, 1201, 1351.

One would think in light of this rather obvious public assistance function that appellees would find it necessary to

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[45]The reason for this requirement is to ensure that "all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

[46]The APTD and OAA sections are worded slightly differently but also refer to a subsistence with "decency and health."

justify a *limitation* on meeting need in terms of some other statutory objective than the one designed to relieve need.[47] Three of appellees' four defenses to the percentage disparity, however, are need-related, and are intended by appellees to demonstrate the proposition that AFDC mothers and their children need a lesser part of what Texas calculates as their minimum standard of need than do other recipients of public aid in Texas. They appear in appellees' amended answer (54). The fourth "justification" is primarily a fiscal one. Appellants will demonstrate the insufficiency of each of these rationalizations, and will then consider in some detail a fifth rationale, which the district court relied upon in denying appellants relief.

(a) *The aged, blind and disabled are normally unable to supplement grants by earnings, while many AFDC children can be and are employed:* The first reason is based on an assumption of earnings capacity. First, it is essential to bear in mind that a recipient's income is taken into consideration in computing the welfare grant in *all* programs. 42 U.S.C. §§302(a)(10)(A), 602(a)(7), 1202(a)(8), 1352(a)(8), Memorandum E-430 (101). Thus, if employed, earnings are subtracted from the welfare standard before the computation of the grant. Indeed, only in AFDC is the standard reduced in half *before* income is subtracted. A percentage reduction is not necessary, then, in order to take into account the availability of earnings, nor will it accomplish that objective.[48] Moreover, assumptions of income not *actually* available violate the Social Security Act. 45 C.F.R. §233.20(a)

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[47]The district court did consider the relationship of the percentage disparity to a non-need related purpose, which we discuss in detail *infra*, p. 70.

[48]Perhaps Texas is trying to recoup some of the money it was required to spend by virtue of the federal requirement, first effective at the same time as the new budget policy, that a portion of AFDC earned income be disregarded. 42 U.S.C. § 602(a)(8). Such a basis for a classification would not suffice since that state objective is an impermissible one under federal law.

(3)(ii); *Lewis v. Martin*, 397 U.S. 552 (1970); *King v. Smith*, *supra*.

In addition, we note that appellees only rely on the earning capacity of AFDC *children* as a justification for the reduction. With respect to children under fourteen, HEW has determined that any such earnings are so negligible that states may make no inquiry whatsoever as to such earnings. 45 C.F.R. §233.20(a)(3)(iii). Moreover, with regard to older children who are still in school, federal law fully exempts from consideration "all of the earned income" of such child. 42 U.S.C. §602(a)(8)(A). To the extent that appellees' first reason is based upon the employability of AFDC children as opposed to an assumption of current earnings by them, we note that a child not in school who refuses a job offer without good cause loses *all* AFDC benefits. Stipulation No. 64 (81). Thus the percentage reduction device is not a rational "whip" or work-incentive—more drastic penalties are in store for the child who does not cooperate.

While appellees rely only on the earnings capacity and employability of children, it will be useful to consider the situation of AFDC caretakers. Fifty-five percent of the AFDC mothers in Texas have no employment whatsoever, according to appellees' own reports (and their stipulation)—because of physical and mental reasons or because there is no work available, they have no marketable skills or they are needed in the home.[49] Appellees in fact have stipulated that half of the AFDC caretakers are too uneducated or handicapped to hold even the lowest paying jobs. Stipulation 90 (86). Moreover, as in the case of a child, an AFDC mother who *is* able to work and refuses a job without good cause loses *all* benefits. Stipulation No. 64 (81). Here too, then, the percentage reduction does not operate as an incentive to seek employment.[50]

[49]Dept. of Public Welfare, Annual Report, 1968, p. 15. Financial Services Handbook, § 2236.3; Stipulation 84 (87).

[50]It should be noted that a state AFDC plan which denies or reduces benefits on the basis of an assumption that work is available

There are obviously those who qualify for aid in *all* categories who are employed or employable. A majority in *all* programs, however, are unemployed. Stipulation 84 (87). Appellees have singled out AFDC mothers to bear the brunt of their assumptions and prejudices, and the district court was willing to accept this despite the evidence in the record to contradict these assumptions. Incredibly, the district court accepted the "whip" theory on the ground that while it may be based on assumptions not supported by the stipulations, such facts "may not have been known to the legislators." 304 F. Supp. at 1338, n. 4.[51] If *Dandridge* is read to permit *any* speculative hypothesis, despite evidence which contradicts its premise and despite a lack of evidence that the legislature ever considered the purported "reason", states will be given not only "wide latitude" but a constitutional carte blanche to distribute welfare resources. Indeed, Texas' grant computation method (discussed in detail in Point II), which subtracts income *after* the standard of need is reduced, negates the work incentive this Court found in *Dandridge*, since when income is subtracted from the grant (as opposed to the standard of need before computation of the payment), a recipient cannot raise her "real income" by employment.[52]

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to "many" of them clearly conflicts with the requirements of the Social Security Act that AFDC aid not be reduced to any mother because of work "availability" unless a series of specified conditions are met. See 42 U.S.C. § 602(a)(15), (19) and 42 U.S.C., 603 *et seq.*

[51] This statement was made with stipulation 90 in mind, regarding the fact that 50% of the caretakers could not qualify for even the lowest paying jobs.

[52] In *Dandridge* the court noted that "[b]y combining a limit on the recipient's grant with permission to retain money earned, *without reduction in the amount of the grant*, Maryland provides an incentive to seek gainful employment." 397 U.S. at 486. This incentive was accomplished since income in Maryland was subtracted from the state standard of need, and the maximum operated to limit the amount of determined need which could be paid. The more income a family earned, the lower the budget deficit or "need" would be, and consequently since there was no reduction in the amount of the grant

(b) *AFDC families are more likely to receive support from legally responsible relatives than are aged, blind or disabled recipients.* As noted above, all income is considered in computing the grant. Thus to the extent there is actually any support available to an AFDC family,[53] it will be subtracted dollar for dollar from the grant. Stipulation No. 67 (82).[54] In addition, it is worth emphasizing that if there is any greater likelihood of relative support in AFDC it may well be the result of intentional state policy designed to discourage relative support of the aged. Thus, Texas law specifically mandates that "no inquiry shall be made into the financial ability of [a] child or other relative, except husband or wife, in determining [an OAA] applicant's eligibility," Public Welfare Act of 1941, Art. 695c, § 20(4), and that assistance shall not be denied even if a child or relative of an OAA applicant "is able to contribute to the applicant's support." *Ibid.* Appellants do no suggest that Texas should deny public assistance to such aged citizens—it may be sound public policy to free children from such a support obligation.[55] The fact is, though, that if Texas wanted to encourage private support in order to free public funds where such support is not available, it could apply a 50 percent reduc-

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there would be a greater likelihood of attaining sufficient total income to reach the standard of need. In Texas, no family can even reach the standard of need by employment since the 50% reduction is applied to the standard itself.

[53]The fathers of one fourth of all AFDC children are either dead, incapacitated or in prison. Stipulation No. 87 (86). Only 15% of AFDC families actually receive support from a father. Stipulation No. 77 (83).

[54]If appellees prevail on their statutory claim under § 402(a)(23), then fathers will have an incentive to support their families if they are able to, since that support will help raise their families up to the minimum standard of need. Under the present system, the support is deducted *after* the percentage reduction is applied, so the family can never attain more than 50% of need.

[55]Of course, given the racial composition of OAA in Texas, and the political preference for that group, we may assume the children also wield some political influence.

tion to OAA grants. We may be assured that most of those children who could, would quickly come to the support of their aged parents in such circumstances. Of course such a policy is grossly unfair, since it penalizes those aged individuals whose children cannot or will not support them. Yet that is what appellees have done to Texas' needy children. It has cut their grants in order to convince mothers to work (most of whom are unemployable) or fathers to provide support (which if available could be obtained under the civil support laws).

Finally, if Texas' policy is designed to account for non-welfare income, it should be noted that recipients of the "adult" programs (particularly OAA) have a *major* source of income not available to most AFDC recipients—the federal old age insurance program (OASDI), 42 U.S.C. § 201 *et seq.*[56] As with all other income, such income is subtracted from the standard of need before actual individual "need" is determined. We do not here emphasize the major scope of the income available to old age (and other adult programs) recipients from the federal OASDI program in order to suggest that old age recipients should suffer grant cuts rather than AFDC recipients. Such a suggestion would be as frivolous and indecent as appellees' reason for cutting AFDC grants (some mothers and children have some income from work or parental support).[57]

[56] 54.7% of OAA recipients receive some social security. Stipulation No. 77 (83). 30.7% of AB recipients, and 25.6% of APTD recipients receive some OASDI, while only 9.7% of AFDC recipients receive social security. Dept. of Public Welfare, Annual Report, 1968, p. 6.

[57] Indeed, even assuming that the percentage reduction device is rational in light of the assumed availability of income, it is questionable whether or not it may be applied only to AFDC on the basis that most AFDC income is earned, while in OAA, it is usually "unearned" (OASDI). See *Anderson v. Burson*, 300 F. Supp. 401 (N.D. Ga. 1968) (three-judge court) which held that a denial of wage supplementation on the basis of the source of the income was unconstitutional in light of the purposes of the Social Security Act, *i.e.* to relieve financial need. Cf. 45 C.F.R. § 233.20(a)(I).

(c) *AFDC recipients will hopefully have future gainful employment, whereas the aged, blind and disabled will normally always require assistance:* Apart from the complete lack of a rational relationship between reducing *current* AFDC financial benefits because of the "hope" that self-support may be a *future* possibility, the Social Security Act flatly prohibits such a procedure. State OAA, AFDC, AB and APTD programs are required to provide that "only such net income as is actually available for *current use* on a regular basis will be considered, and only *currently* available resources will be considered." 45 C.F.R. § 233.20(a)(3)(ii)(c) (emphasis added). See also *Lewis v. Martin, supra; King v. Smith, supra.* The welfare grant is designed to sustain life *now;* a fifty percent reduction will most likely prevent the children from ever achieving their alleged "potential" for future self-care. Thus appellees have stipulated that

> "proper food and education are vital for children receiving AFDC. The younger the child receiving AFDC the more it would benefit from the help the state can provide through AFDC." Stipulation No. 97 (87).

Moreover, appellees stipulated that

> "when a child receiving assistance reaches school age much of what the State Welfare Department can offer comes too late. Children receiving State Welfare grants need state help as toddlers through proper nutrition and environment so that they will be ready for school when they get there." Stipulation No. 98 (87).

AFDC reductions in current grants on the basis of future "potential" is not only irrational in view of the purposes of the program, but it apparently is counterproductive to the very assumptions upon which appellees rely.[58]

[58] Even assuming *potential* for future self-care is a relevant factor in determining the percentage of *current* needs which will be met, Texas has concluded that recipients in *all* categories have that potential. Thus welfare officials are directed to provide social services "with the fundamental objective of assisting those who need them to return to independent economic, social and emotional functioning."

(d) *Since AFDC is the program with the rising rolls, AFDC children should bear the burden of the cost of rising rolls:* In this point, we consider the other reason conjured up by appellees, but not pleaded. This argument has two parts: (1) since a fixed sum is appropriated by the Legislature for each category, there is no alternative to spreading increased AFDC costs among AFDC recipients; (2) it is only fair that AFDC recipients bear the burden of rising AFDC rolls.

The reasoning with regard to appropriation is circular. It assumes the validity of the original allocation of the lion's share of the available money to adult programs, leaving only minor leftovers to be divided among increasing numbers of children.[59] This is the very assumption appellants challenge. They challenge not only appellee Hackney's administration of the appropriations, but also state statutes which restrain him from spending more than $6,150,000 on AFDC out of $60,000,000 allotted for the four programs (45). It is of particular relevance that while Mr. Hackney concedes that he knew that AFDC rolls were rising during the past few years, and only once did the Legislature appropriate less than he requested, he nonetheless did not request more AFDC funds. See Hackney Deposition, p. 37; Stipulation No. 45 (76). Indeed, in response to counsel's inquiry in this regard, Mr. Hackney could only say "no comment." Hackney Deposition, p. 38.[60]

Financial Services Handbook, § 3100. Caseworkers are reminded that "to render these services effectively requires alertness, imagination and conviction that *most people have a potential of some kind for self help.*" *Id.* at § 3152.41 (emphasis added).

[59]As noted above, the Legislature now has the state Constitutional authority to distribute welfare funds among the categories in any way that it wants, as it is limited only in the *total* sum it may appropriate.

[60]The colloquy on this point tells much about the invidiousness of the discrimination against AFDC recipients:

> "Q. I am still rather curious about the fact that with the projected increases, and almost inevitable increases, in the number of children on the rolls, with the almost inevitable

Moreover, the proposition that it is "fairer" to reduce AFDC grants because the AFDC rolls have increased, assumes that there is some rational distinction between an AFDC-eligible and an OAA-eligible in terms of the financial assistance purposes of the programs. This merely begs the question in this case. Thus if more and more children apply for assistance in Dallas than in Austin, it surely would not be rational to reduce the grants in Dallas, *unless subsistence needs were determined to differ in Dallas. Cf. Rothstein v. Wyman*, 303 F. Supp. 339 (S.D.N.Y. 1969), *vacated and remanded for initial consideration of statutory claim*, 398 U.S. 275 (1970); *Boddie v. Wyman*, 434 F.2d 857 (2d Cir. 1970), *aff'd mem.*, 402 U.S. 991 (1971). Why then reduce AFDC grants (rather than *all* grants) to accomodate increases in AFDC rolls, absent a showing that AFDC and OAA recipients have different needs, or that such reductions would serve some other proper governmental objective.[61]

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increase in the cost of living, the figures I have available to me show that this Department has repeatedly requested much lower amounts of money for AFDC, and it repeatedly got much lower amounts of money for AFDC; and in only one year, the year 1968, within the last five years did this Department request more money than was appropriated for it in the AFDC category. Now, I am trying to figure out why you don't request more money for AFDC.

"A. You try to figure it out.

"Q. Well, can you?

"A. I have no comment.

"Q. You don't?

"A. No, I have no comment to make on it."

Hackney Deposition, pp. 37-38.

[61] We put to one side our strong doubt that Texas, faced with a choice of appropriating more funds for needed welfare purposes, or reducing the favored, primarily white old age category (with that category's strong political influence), would actually reduce the old age category. Here, for purposes of analysis we assume reduction rather than a larger appropriation. The issue here is whether it is reasonable, as suggested by appellees, to require the needy children to be the sole bearers of the burden caused by rising children's rolls and, therefore, the group which absorbs the full impact of any reduction.

The issue posed here is also one of those faced by this Court in *Shapiro v. Thompson, supra.* There the appellants argued that the removal of the discrimination against new residents would cause a sharp increase in welfare expenditures, that such money might not be available, and *that the long-term residents would suffer reduced grants.* By permitting the classification, appellants argued, "[S]tate programs. . .will not be impaired by a substantial influx of resident newcomers." 394 U.S. at 628. The Court in *Shapiro,* however, rejected the "implicit" distinction that the newcomers who apply for welfare benefits "are somehow less deserving" than long-term indigent residents. 394 U.S. at 631-32.[62] *Shapiro* makes clear that a state cannot justify a discrimination against one group, while favoring another similarly situated group, on the ground that giving equal treatment to the first group will leave less money available for the second group or cause greater welfare expenditures than it is prepared to meet. *There must be a separate ground for distinction between the two groups.* Appellees have shown none.

The distinctions created between needy mothers and children, on the one hand, and elderly people on the other, *are particularly invidious in light of a major reason why the numbers of mothers and children are increasing on the rolls.* In short, the AFDC rolls in Texas have been rising because this Court in *King v. Smith, supra,* found that the

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[62] The Court added:

> "We recognize that a State has valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools. Similarly, in the cases before us, appellants must do more than show that denying welfare benefits to new residents saves money. The saving of welfare costs cannot be an independent ground for an invidious classification." 394 U.S. at 633.

type of AFDC rules used by appellees had *illegally* excluded needy children from assistance. Memorandum E-417 (90).[63]

Having illegally excluded thousands of children in the past, Texas now argues that those and other children presently on the rolls are the very ones who should carry the burden produced by judicial reversal of Texas' illegal policies. Here indeed is a novel theory of equal protection. It is tantamount to saying that if Texas had conspired to keep more Negroes off the public assistance rolls but was prevented from continuing to do so by judicial decision, the Negroes thereafter admitted to the rolls (as well as the Negroes earlier on the rolls) should receive lower grants than anyone else since they are the ones causing the rolls and costs to rise.

Suppose, for a moment, that Texas had *not* illegally kept thousands of needy children off the welfare rolls, and that Texas—from the beginning—had legally and fairly administered its AFDC program. In that case, Texas would not be able to use the "rising AFDC rolls" argument. Surely Texas cannot now be more free to discriminate against needy children than it would have had it acted in keeping with the Social Security Act and the Constitution in the first place. Appellants do not here argue that the Equal Protection Clause requires Texas to appropriate more money for AFDC. We contend only that similarly situated needy people must be treated equally, and that judicial reversal of illegal exclusionary policies cannot be turned into a constitutionally

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[63] As admitted by appellee Hackney, the reductions were necessary because

> "The AFDC rolls in Texas have been increasing over the last number of months at a level of about 3,000 children per month. The Department has been able to handle this increase within the appropriated amounts, but it is anticipated that the rolls will further increase another 15 to 25% as a direct result of the Supreme Court ruling on the 'man-in-the home' policy" (90).

permissible justification for further discrimination against the very needy persons who were the victims of those illegal policies.

(e) *The district court's major justification—each program has a purpose in addition to meeting financial need, and those purposes justify differences in grants levels:* The court below acknowledged that all four programs have a common purpose of relieving need of the indigent persons covered, that they all share a wide number of administrative regulations, that they all arise under the same Social Security Act and Texas Public Welfare Act. Indeed, the appellees, as noted earlier, apply but *one* standard in determining the minimum subsistence needs of all recipients whether they are AFDC, OAA, APTD, or AB. In no way does the court below dispute the proposition that the need of the indigent in any one category is the same as the need in the other ("need" is defined for each recipient prior to a reduction in amount of grant based on his "category"). Stipulation No. 63 (81).[64] However, the court below argues that each of the programs has an additional purpose besides that of relieving need. The court noted that "[i]n the non-AFDC programs, the emphasis is primarily on the creation and the retention of the ability for self-care. . . AFDC, on the other hand, is designed primarily to maintain and strengthen family life." 304 F. Supp. at 1336. The court relied on these "additional purposes" to

> "justify in large measure the difference in financial assistance accorded recipients in the various welfare programs. Under this view, the difference in grants between programs merely reflects the fact that disparate purposes call for dissimilar solutions." *Ibid.*

The court reached this result by reasoning that "[s]elf-help for the aged, blind and disabled may indeed pose a more

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[64] See generally section A, *supra*, for a discussion of the identity of purposes in the various welfare programs—to meet need, and combat dependency.

pressing social problem than strengthening family life among recipients of AFDC. This question is for the legislature." 304 F. Supp. at 1337.

The district court misunderstood these non-financial public assistance "purposes". As noted in section A, *supra*, these additional purposes are *all* rehabilitative in nature and *all* are designed to reduce the dependency of the recipient. See *King v. Smith, supra*, 392 U.S. at 325, n. 22. Thus the additional purposes were added to each title at the same time (1956) by the same public law, and with the same goal in mind. See P.L. 84-880, § 300, 84th Cong., 2d Sess. (1956). In each program Congress implemented the rehabilitation purpose in the same way. Thus each public assistance plan had to include a description of those *social services* which it would provide to accomplish the rehabilitation effort Congress sought to encourage. See 42 U.S.C. § § 302(a)(10)(C), 602(a)(13), 1202(a)(13), and 1352(a)(12).[65] Congress made clear that the accomplishment of the new statutory objective was dependent not on the financial assistance aspect of the program, but on these newly-financed social services. See S.Rep. No. 2133 on H.R. 7725, 84th Cong., 2d Sess. (1956), 1956 *U.S. Code Cong. and Admin. News*, pp. 3938-39.[66] Texas statutes and regulations mirror

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[65] Indeed, in 1962 the provision of certain social services was made *mandatory* in AFDC, and increased federal matching funds were made available for the mandatory services. 45 U.S.C. § 602(a)(14), (15); 603 (a)(3)(A). Increased matching is available for OAA, AB and APTD as well if the state voluntarily agrees to provide certain minimum services as prescribed by HEW. 45 C.F.R. § 222.20 *et seq.*

[66] Thus, the Senate Report explains that "the bill would amend section 401 [AFDC] . . . to make it clear that the purpose of title IV of the act includes not only financial assistance, but also services to maintain and strengthen family life and to help the relatives caring for dependent children attain that degree of self-support and personal independence consistent with maintaining parental care and protection." Id. at 3938. The *services* are specifically noted as designed to "achieve the purposes of" the rehabilitation amendments. *Ibid.* Similar language appears with respect to the other titles.

the federal program in terms of the 1956 Social Security Act amendments. Thus Art. 695c, § 4(12) authorizes the provision of social services in *all* programs, services which are all "designed to help families *and* individuals attain or retain capability for independence and self-care." Appellees' own regulations recognize the common purposes accomplished by the provision of social services. See, *e.g.*, Financial Services Handbook §§ 3100, 3150, 3152. We do not doubt that the particular social services required may vary depending on the source of dependency (age, blindness, death of a spouse), but that does not negate the identity of *general purpose*.

Further, the lower court was wrong to find that even the particulars of these broad purposes differ. Thus, in AFDC, the reaching of "maximum self-support and personal independence" by the caretaker relative is stated as a primary purpose. 42 U.S.C. § 601. In OAA, "capability for self-care" is important. 42 U.S.C. § 301. In AB and APTD the wording is "capability for self-support or self-care". 42 U.S.C. §§ 1201, 1351. It is inconceivable that these minor differences in wording can provide the rational nexus between paying 50% of AFDC needs and 95 to 100% of "adult" needs. If the *only* difference in legislative purposes is that in AFDC there is an *additional* purpose, namely the strengthening of family life, the appellees can hardly suggest that they are furthering this additional purpose by the provision of less than full subsistence needs. Obviously when grants are below defined subsistence levels the additional service function of the Act will be frustrated. Thus in discussing the 1962 social services amendments, the Court in *King v. Smith*, 392 U.S. at 325, n. 22, noted that

> "President Kennedy, in his 1962 welfare message to Congress, observed that the communities that had attempted to cut down welfare expenditures through arbitrary cutbacks had met with little success, but that 'communities which have tried the rehabilitative road—the road I have recommended today—have demonstrated what can be done with creative pro-

grams of prevention and social rehabilitation.' See Hearings on S. 10606 before the Senate Committee on Finance, 87th Cong., 2d Sess. 109 (1962)."

Cutbacks in financial assistance were in the eyes of the draftsmen of the 1962 amendments the very road to be avoided—surely cutbacks directed solely at AFDC recipients cannot be supportive of the service provisions of the Act.

Finally, the district court was satisfied when it found what it viewed as different purposes in the various programs. *The court never inquired into whether or not the classification being challenged could in any way be justified by the alleged difference in purposes.* If this case were challenging Texas' failure to offer marriage counseling services to aged welfare recipients while it provided such services to AFDC mothers, we would understand the relevance of the alleged differences in purpose between the programs. But Texas may not arbitrarily set welfare payments at 50% of need in AFDC based on a non-financial variation in purpose. If the district court were correct that the Texas legislature might believe that services for adults are a more pressing social problem than rehabilitative services for children, then the legislature should provide a greater variety of services to adults than it does for AFDC families—it should not starve the children in the process.

D. The Discriminatory Impact of the Percentage Reduction Violates Title VI of the Civil Rights Act of 1964.

Title VI provides:

> "No person in the United States shall, on the ground of race, color, or national origin, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d."

There is no doubt that the programs of categorical assistance under the Social Security Act are "Federal financial assistance" subject to Title VI, and that a Black or Mexican-

American recipient under any such program may challenge discriminating state actions committed under the program. See *e.g., Ward v. Winstead, supra.* For the most part, of course, Title VI merely reiterates the obligations imposed by the Fourteenth Amendment, and appellants' constitutional argument is fully applicable to Title VI as well. But specific strictures of Title VI also strengthen and reenforce the points already made by appellants. Through Title VI, Congress has expressed its special concern for policing discriminatory state action which is Federally supported. When such Federal support comes into play the courts need not rely solely on the generalized constitutional antagonism to racial classifications but also must consider a specific Federal policy against implicating the Federal government in anything which smacks of discrimination.

There has been no litigation under Title VI itself which casts any significant light on the standards to be applied in this case. The several challenges to AFDC discriminations in other states, *Lampton v. Bonin, supra; Ward v. Winstead, supra,* also raised Title VI claims, but the failure to prove adequate racial disparities in those cases distinguishes them from the present case. A companion section to Title VI, Title VII of the same 1964 Civil Rights Act, has, however, produced an instructive precedent. The first major Title VII decision in the Supreme Court, *Griggs v. Duke Power Co., supra* posed a situation almost precisely analogous to that at bar. As discussed above, in *Griggs* the employer adopted a policy of denying promotions to persons who did not have a high school diploma and could not pass a battery of tests. There was no allegation that this policy was racially motivated or that it applied only to Blacks. Indeed, the record in the case shows that many Whites as well as Blacks were excluded from promotion by it. However, as is the case with Texas' welfare cutbacks, the burden of the policy fell disproportionately on Blacks because they were

less likely to meet the standards.[67] This was enough to invoke the protection of the Civil Rights Act of 1964. This Court observed in *Griggs* that:

> "The Act proscribes not only overt discrimination, but also practices that are fair in form but discriminatory in operation." 401 U.S. at 431.
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> "The Court of Appeals held that the Company had adopted the diploma and test requirements without any 'intention to discriminate against Negro employees.' We do not suggest that either the district court or the Court of Appeals erred in examining the employer's intent; *but good intent or absence of discriminating intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups . . .*" 401 U.S. at 432.

The Court went on to caution that a test would be sustained only if it was justified by business necessity, but that the employer has the burden of proving that necessity. See, *e.g. Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401 (D. Cal. 1970) (denying employer right to exclude persons with arrest records); *Johnson v. Pike*, 3 FEP Cases 1025 (C.D. Calif. 9/29/71) (denying employer right to discharge employees whose wages were garnished).

It would seem logical that the *Griggs* rational should apply to Title VI as well as Title VII. *Cf. Chance v. Board of Examiners, supra.* HEW regulations implementing Title VI for that agency read much like this Court's decision in *Griggs.* In general, the regulations forbid grantees (*e.g.*, Texas) from directly, or through agreement with others, differentiating in the level of services, or financial assistance

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[67] The racial differentials in *Griggs*, at least as to the high school diploma requirement, were less significant than in the case before this court. The Supreme Court in *Griggs* thought it sufficient for purposes of finding discrimination that 34% of Whites had high school diplomas and only 12% of Blacks. See 401 U.S. at 430, n. 6.

made available under the grant to any individual on ground of race, color or national origin. 45 C.F.R. § 80.3. Moreover, grantees of federal funds may not take action which has the *effect* of such discrimination. 45 C.F.R. § 80.3(b)(2).[68] HEW has specifically warned that a grantee "may not take action that is calculated to bring about indirectly what this Act forbids it to accomplish directly." 45 C.F.R. § 80.65(h). It should be clear that the *Griggs* principle applies to Title VI (and the Fourteenth Amendment) as well as Title VII. The Texas welfare cutbacks which are clearly "discriminatory in operation" must be enjoined unless justified by some legislative necessity. As demonstrated earlier, no such necessity exists for the peculiar categorical selection which Texas has made.

POINT II

TEXAS' FAILURE TO USE THE ADJUSTED STANDARD OF NEED IN ITS AFDC PROGRAM TO DETERMINE ELIGIBILITY FOR AFDC PAYMENTS AND CONCOMITANT SERVICES VIOLATES SECTION 402(a)(23) OF THE SOCIAL SECURITY ACT

While this is the second time the Court has been asked to consider § 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), appellants' basic position is that the statutory issue presented in this case under that section was in fact

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[68] "A recipient, in determining the types of services, financial aid, or other benefits, or facilities which will be provided under any such program, or the class of individuals to whom, or the situations in which, such services, financial aid, other benefits, or facilities will be provided under any such program, or the class of individuals to be afforded an opportunity to participate in any such program, may not, directly or through contractual or other arrangements, utilize criteria or methods of administration which have the *effect* of subjecting individuals to discrimination because of their race, color, or national origin, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."

already decided by the Court in *Rosado v. Wyman, supra.* Unless the decision below is reversed, and the *Rosado* decision adhered to, the Court will leave § 402(a)(23) with virtually no practical effect, contrary to the usual canons of statutory construction, see *Rosado v. Wyman, supra,* 397 U.S. at 415; *Uptagrafft v. United States,* 315 F.2d 200 (4th Cir.), *cert. denied* 375 U.S. 818 (1963); *General Motors Acceptance Corp. v. Whisnant,* 387 F.2d 774 (5th Cir. 1968), as well as the scheme of the federal AFDC legislation. An examination of the *Rosado* decision, the relationship between the standard of need and welfare eligibility, both as a matter of social work and of welfare law, the historical backdrop to HEW's position with respect to this question, and the structure of the federal categorical assistance programs will conclusively demonstrate the invalidity of the Texas budgetary method.

A. Rosado v. Wyman

On July 1, 1969, the State of New York eliminated from its AFDC standard of assistance those items which it had previously recognized as "special needs," *i.e.* available to recipients when need was demonstrated in the particular case according to defined criteria established by the state welfare agency. The result was to drastically reduce welfare payments to a substantial number of AFDC recipients in the state and, in the process, reduce New York's welfare budget by approximately $40,000,000. The district court enjoined the elimination of these items, holding that the dual mandate of § 402(a)(23), namely that the "amounts used . . . to determine the needs of individuals" be adjusted to reflect cost-of-living changes since those amounts were last established, and that "any maximums" on the aid paid be proportionately adjusted, clearly required an upwards adjustment to all AFDC *payments;* a reduction of payments as New York had accomplished was *a fortiori* proscribed. *Rosado v. Wyman,* 304 F. Supp. 1356 (E.D.N.Y.1969).

Petitioners before this Court in *Rosado* argued the same theory of § 402(a)(23) relied upon by the district court (and by the three-judge court in this case), namely that § 402(a)(23) required states to raise AFDC payments to reflect cost-of-living increases. This Court squarely rejected their position, and construed § 402(a)(23) literally to require only that the standard of need be adjusted, and that any dollar maximums on the amount of aid paid be similarly adjusted. 397 U.S. at 412. New York's violation of § 402(a)(23) was not in its reduction in payments *per se*, but in its reduction of the standard of need by the elimination of items therefrom, since such an elimination amounted to a "circumnavigation" of the cost-of-living adjustment. 397 U.S. at 415. The Court declared that:

> "Consistent with this interpretation of § 402(a)(23), a State may, after recomputing its standard of need, pare down payments to accomodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the actual standard of need." 397 U.S. at 413.

The Court found, however, that its more limited interpretation of § 402(a)(23) did not, contrary to the suggestion of petitioners in *Rosado*, thereby render the section meaningless. It found that "the cost-of-living exercise. . . has both practical and political consequences." 397 U.S. at 413. These consequences are discussed below. Appellants here maintain that Texas' method of determining eligibility for, and the amount of, AFDC payments negates each of those consequences; this Court need only agree with us on any one for the judgment to be reversed.

1. *Increased Eligibility*

Perhaps the most important of the consequences of § 402(a)(23) discerned by this Court is that

> "It has the effect of requiring the States to recognize and accept the responsibility for those additional

> individuals whose income falls short of the standard of need as computed in light of economic realities and to place them amongst those eligible for the care and training provisions." 397 U.S. at 413.

Such an effect to § 402(a)(23) is attributable to the function of the standard of need as the determining factor of AFDC eligibility, and to the Court's assumption that all families "in need" under the state's need standard are eligible for cash assistance.

As the Court noted in *Rosado*, the standard of need is the "yardstick for measuring who is eligible for public assistance," 397 U.S. at 408, and thus an updating of the standard should render eligible for aid those families whose income is lower than the adjusted standard, but who were theretofore ineligible since their income exceeded the standard as it existed prior to the adjustment. New York's reduction of the content of its standard of need was illegal since it "avoid[ed] the consequences of increasing the numbers eligible and facing up to the failure to allocate sufficient funds to provide for them." *Rosado*, 397 U.S. at 415. Texas' violation is identical. By using only a fraction of its standard of need to determine eligibility for AFDC payments (50% at the time of the original district court decision), Texas has avoided its obligation to place on the assistance rolls those marginal families who are presently needy under Texas' standard of need but who were ineligible under the standard of need in effect prior to the 11% cost-of-living adjustment in May 1969. As the district court found, rather than increase eligibility, Texas eliminated almost 2500 families from the AFDC program with the adoption of the new budgetary method (including plaintiff Davila), 304 F. Supp. at 1343, while benefits for over 20,000 families were reduced. *Ibid.*[69] The net effect is that many admittedly

[69] These figures, appearing in the district court's initial decision in this case, are based on the use of a 50% reduction factor. The principle is the same, however, whatever percentage is used since all those families with income below the adjusted standard of need but above the "reduced" standard will be illegally kept off the rolls. As long

needy families, including families heretofore receiving assistance, are deprived of not only a small money payment, but are also precluded from a variety of social services, employment training, work incentives, and medical assistance under Title XIX of the Social Security Act, all of which are keyed to the receipt of financial assistance. See section C, *infra*.

The Solicitor General, in his *amicus* brief filed prior to the noting of probable jurisdiction in this case,[70] admits that if the language quoted above from *Rosado* regarding the eligibility of additional individuals due to the cost-of-living adjustment "is a binding construction of the Act, appellants are entitled to prevail," since "Texas has avoided the stated effect for a limited class of its needy residents." *Amicus*, p. 5.[71] The *amicus* contends, however, that the question of the relationship between AFDC eligibility and the § 402(a)(23) cost-of-living adjustment to the standard of need was not before this Court in *Rosado*. *Ibid.* Appellants believe that this position is a disingenuous one, and represents the federal agency's effort to avoid the consequences of its own position before this Court in *Rosado*. More importantly, a careful reading of the *Rosado* decision makes clear that the "practical effect" of increased eligi-

as the "reduced" standard is less than the previous eligibility level, as adjusted to account for the increase in living costs, § 402(a)(23) is "circumnavigated." In Texas, the present 100% standard of need is the "amounts used to determine need" which was adjusted pursuant to § 402(a)(23). Thus any eligibility level below the 100% standard violates § 402(a)(23).

[70] References to the Solictor General's *amicus* brief will be cited here as *Amicus*, p.____.

[71] As noted above, at the time of the original decision of the district court, 2500 families were stricken from the AFDC rolls as a result of the new budgetary method. As of May 1969, there were 36,400 AFDC families in Texas. NCSS Report AFDC-3(69), U.S. Department of Health, Education and Welfare, December 1970. Thus, even if *no* additional eligibles would have been added to the rolls by virtue of Texas' 11% cost-of-living increase to its standard, the eligibility of about 7% of the caseload was affected. Of course, it is inconceivable that *no* additional families would have been rendered eligible.

bility was fundamental to the Court's decision. Indeed, in noting the practical and political consequences it found in § 402(a)(23), *including the eligibility consequences*, the Court specifically recognized that its conclusions with respect to the effects of § 402(a)(23) were necessary to give the section "some meaning," 397 U.S. at 413, so as to avoid rendering the statute "a meaningless exercise in 'bookkeeping.'" 397 U.S. at 413.

The Solicitor General argues that since New York purported to pay 100% of need "in *Rosado* . . . there was no question whether [a cutback in AFDC payments] could be made in a way that denied benefits to individuals who received income in an amount less than the state standard of need." *Amicus*, p. 6. While the propriety of the Texas-type budgetary method concededly was not directly framed by the parties to *Rosado* as a "question presented," appellants maintain that it was *squarely* before the Court, and decided after specific consideration of the question raised in this case. Petitioners in *Rosado* explained in their brief, *using Texas as an example*, that states were subtracting income from a reduced standard in determining eligibility after the updating, rather than from the standard of need. See Petitioner's Brief, *Rosado v. Wyman*, No. 540, O.T. 1969, p. 68. They argued that if payments did not have to be increased under § 402(a)(23) and such a procedure could be followed, no practical effect could be found in § 402(a)(23) in such a state since along with reduced payments, reduced eligibility would follow the cost-of-living adjustment.[72] The Court rejected the *Rosado* petitioner's contention that this demonstrated the invalidity of payment reductions and found, instead, that states could not implement a percentage reduction in such a manner. Thus, in opting for increased eligibility as a practical consequence of

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[72] This argument was also pressed before this Court in the jurisdictional statement filed in *Lampton v. Bonin*, No. 1112 Misc., O.T. 1969. See the discussion of *Lampton, infra*.

the statute, the Court specifically defined "ratable reduction" as follows:

> "A 'ratable reduction' represents a fixed percentage of the standard of need that will be paid to all recipients. In the event that there is some income *which is first deducted*, the ratable reduction is applied to the amount by which the individual or family income falls short of need." 397 U.S. at 409 n. 13 (emphasis added).

Rosado thus clearly recognizes that any reduction must be applied to the needs determination (full need standard less available income). Only if such a procedure were followed would there be any guarantee that the adjustment of the need standard would render additional persons eligible, thus giving content to § 402 (a)(23).

Further evidence that this Court in *Rosado* did not reach its conclusion unwittingly as to the effect intended by § 402 (a)(23) on AFDC eligibility, and the Texas budgetary approach, is the simultaneous pendency before the Court of the appeal in *Lampton v. Bonin*, 304 F. Supp. 1384 (E.D. La. 1969), *vacated and remanded for reconsideration in light of Rosado*. 397 U.S. 663 (1970). The three-judge court in *Lampton*, which construed § 402 (a)(23) as not mandating an increase in AFDC payments, emphasized the function of the full need standard as the determining factor in eligibility for payments and services, and consequently found significant effects for that section even if increased payments were not mandated. Judge Wisdom rejected the premise behind the increased payment argument since it failed to take into consideration that § 402 (a)(23) is not "meaningless" since

> *"One of the effects of Section 402 (a)(23) as interpreted by HEW*[73] *and defendants is to make additional*

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[73] In a brief submitted by the Secretary of Health, Education and Welfare as *amicus curiae* in *Lampton*, HEW advised the court (at page 22) that its interpretation of § 402(a)(23) (permitting a reduction in payments) would not "nullify" that section, but would leave it with "some significant effects":

> *persons eligible for AFDC payments as well as for concomitant services* provided not only for the child but also for his parents and family members. An examination of the many lengthy provisions added to Section 402 by the 1967 Social Security Amendments shows that Congress's major concern was the provision of family counseling and rehabilitation services, work incentives, and family planning programs to reduce out-of-wedlock births, for all persons in the family, in order to promote self-support and child development and to strengthen family life. See U.S. Code, Cong. & Admin. News, Vol. 2, 90th Cong., 1st Sess. (1967), p. 2837. *By making those with marginal incomes eligible for AFDC by raising the standard of need, more persons would be eligible for such services* which Congress considered vital to cut down in the long run the numbers dependent on welfare." *Lampton v. Bonin*, 304 F. Supp. at 1389 (emphasis added).[74]

The majority in *Lampton* reached its conclusion despite the dissenting judge's observation that HEW's position in *Lampton, i.e.* that financial eligibility would be increased if the standard of need were adjusted, was not taken by the federal agency in Texas (in this case) since Texas "applied its ratable reduction to the standard of need, rather than the budgetary deficit," 304 F. Supp. at 1392, and in the process had reduced AFDC eligibility. Judge Cassibry assumed in light of HEW's position regarding the

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> "If the need standard is raised to reflect higher living costs, additional individuals become eligible for ADC. In our example, if the need standard goes from $100 to $120, more individuals with income will now be eligible. They will receive small assistance payments and also medical care (under the State's title XIX plan in most States) and a variety of social and rehabilitative services."

The HEW *Lampton amicus* was reprinted by Petitioners in *Rosado* as an appendix to their brief on the merits.

[74] The *Lampton* opinion thus parallels in reasoning the subsequent decision of this Court in *Rosado*. It is not unreasonable to conclude that this Court may well have been persuaded by the opinion of Judge Wisdom. Surely it was aware of it.

acceptability of Texas' method, that a state could *reduce* eligibility consistent with § 402(a)(23). He thus concluded that such an interpretation would leave the section with no meaning, and so dissented. The *Lampton* majority's reliance on the effect of § 402(a)(23) on AFDC eligibility in the face of explicit recognition of the Texas method, by the dissent coupled with the fact that the *Lampton* decision was well-known to this Court, further supports appellants' view that the propriety of using a percentage reduced standard to determine eligibility was rejected in *Rosado*.

HEW's position in *Lampton* was maintained before this Court in its *amicus* in *Rosado*. The Solicitor General told this Court that

> "recalculation of need may serve to render eligible for benefits families which may appear under unadjusted standards marginally to have attained self-sufficiency, but which in fact are unable to subsist at the present cost-of-living. Families thus eligible would receive at least a small money payment, and would also be eligible for medical assistance and social and rehabilitative services." Memorandum of the United States as Amicus Curiae, *Rosado v. Wyman*, No. 540, O.T. 1969, p. 8.[75]

It is rather incredible that the federal agency now repudiates its own "expertise" which was offered in support of its view of § 402 (a)(23) in 1969. In any case, it is clear from the above that the question of AFDC eligibility and the Texas budgetary method was indeed before this Court and decided in *Rosado*.

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[75] It is worth noting that in the two courts before which HEW did not make its "increased eligibility" argument, welfare recipients prevailed on their claim that an adjustment to payments was required. In the instant case, as noted above, HEW's *amicus* in the district court omitted any reference to this point, since in Texas 2500 families were struck from the AFDC rolls under Texas' proferred compliance. In *Rosado* in the district court, HEW did not file a brief.

Finally, one last point is worth mentioning. The Solicitor's contention that this Court did not mean to say what it did with respect to AFDC eligibility in *Rosado* is rather difficult to accept in light of the repeated references to this point in its opinion. See 397 U.S. at 408, 409, 413, 415, 421. We might realistically expect that the Court would not have been so preoccupied with financial eligibility had it not considered the question to be essential to the resolution of the issue presented in *Rosado*.[76]

In sum, the Government's argument that the increased eligibility effect of § 402(a)(23) was not before the Court in *Rosado* is patently incorrect, and misses the point of that decision. To be sure, the precise question before the Court was not "how may ratable reductions be applied?"[77] However, as we have shown, the Court had to determine the purpose and effect of § 402(a)(23) in order to decide whether New York's program was satisfactory. The Court held that § 402(a)(23) required New York to "accept responsibility," 397 U.S. at 413, for those newly determined "needy" families, and thus § 402(a)(23) proscribed a reduction in the content of the need standard. Similarly, Texas may not

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[76] In a brief submitted to the district court in Washington, D.C., the United States Attorney urged that other language in *Rosado* (at 397 U.S. at 306, n. 8) should be accepted by that court as governing law. The Government noted that given this Court's extensive familiarity with the AFDC program, "the Court's remarks in *Rosado*, or in any case involving the AFDC program can hardly be dismissed as 'offhand comments.'" Brief for Defendants, *N.W.R.O. v. Finch*, No. 2954-69 (D.D.C.), p. 9, n. 2. Indeed, HEW has characterized *Rosado* as "a lucid and thoughtful discussion," HEW State Letter No. 1083, 5/25/70.

[77] Indeed, would the Government contend that this Court's acquiescence to reductions in payment was dictum and thus is open to reconsideration in this case, since New York still purported to pay 100% of need. After all, the district court in *Rosado* noted that the permissibility of *payment* reductions was "not formally before the Court," 304 F. Supp. at 1378, and HEW's *amicus* in *Rosado* (at page 10) also argued that that question was not before the Court. Of course, such a position would be absurd.

refuse to accept such responsibility by another device which equally "circumnavigates" the cost-of-living adjustment. Its noncompliance with § 402(a)(23) has resulted as much as New York's "in limiting the welfare rolls unduly." 397 U.S. at 421.

The only other court since *Rosado* to decide the question of whether or not the standard of need, as adjusted to take into account increases in the cost of living, is required under § 402(a)(23) to be used as the measure of financial eligibility, reached the same conclusion as do appellants herein. In *Alvarado v. Schmidt*, 317 F. Supp. 1027 (W.D. Wisc. 1970) (three-judge court), an omnibus attack on several different aspects of Wisconsin's program under § 402 (a)(23), plaintiffs challenged the validity of the budgetary method employed by Wisconsin in determining eligibility for and the amount of AFDC payments. Briefly, prior to November 1969, Wisconsin had applied a standard of need which consisted of various "allowances" (basic needs, shelter and special needs), and paid to eligible families 100% of determined need. The needs standard was updated as of November 1969.[78] At the same time the state established a new level of benefits which was determined not by reference to the standard of need but by application of four entirely separate allowances. This benefit level was significantly less than the standard of need. Eligibility for AFDC assistance and the computation of benefits was determined under the November 1969 plan by setting off any outside income against the benefit level, *not* the standard of need. The *Alvarado* court struck down this system, relying exclusively on *Rosado* and § 402(a)(23):

> "[I]t is clear that one of the functions of a standard of need is to serve as "a yardstick for measuring who is eligible for public assistance." *Rosado* at 408. Having this function, when the standard of need is adjusted to reflect cost-of-living changes, as

[78] Plaintiffs in *Alvarado* also challenged the sufficiency of the updating.

required by the federal statute, the adjustment has an impact on the determination of *eligibility*.

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The State has not used the revised standard of need to determine eligibility for AFDC recipients in Wisconsin. Instead of using the revised standard of need to determine eligibility, the state has used the payment level itself which the state calls the "basic allowance." Thus, instead of using the figure of $167 for a family of four, the state has used the figure of $126. It is important to note that this procedure for determining eligibility has real consequences for poor people in Wisconsin. By using a lower standard to determine eligibility, the state has undoubtedly denied access to the AFDC program to many persons who would be eligible were the correct, revised standard utilized. The court in *Rosado* found that § 402(a)(23) was more than merely a "meaningless exercise in bookkeeping." If states were permitted to revise their standard of need and then simply not use it, § 402(a)(23) would indeed be rendered a futile gesture on the part of Congress. Accordingly, *we find that in not using its revised standard of need to determine eligibility for the AFDC program in Wisconsin, the state has violated the federal statute.* 317 F. Supp. at 1037-38 (emphasis added).

As did Wisconsin, Texas is using a standard to determine AFDC eligibility which is lower than its revised standard of need and in so doing has rendered § 402(a)(23) a "futile gesture." Appellants urge that the logic of the *Alvarado* decision is compelling, and is indistinguishable from the violations of federal law being perpetrated by Texas.[79]

[79] There is no distinction for purposes of this case between use of a percentage reduced standard to determine eligibility for AFDC (Texas) and the use of some other figure which is lower than the 100% standard for the same purpose. The illegality under § 402(a)(23) results from using a financial eligibility standard which is less than the amount which is derived by applying the proper cost-of-living factor to the standard of need in effect when § 402(a)(23) was enacted. In such a case, the increased eligibility function of the section is avoided, however the state may derive the lower level.

2. *Other Consequences of § 402(a)(23)*

The other "practical consequence" of § 402(a)(23) according to the Court is the incentive provided by that section for states which use them to abandon dollar maximums. The Court noted that

> "[B]y imposing on those States that desire to maintain 'maximums' the requirement of an appropriate adjustment, Congress has introduced an incentive to abandon a flat 'maximum' system, thereby encouraging those States desirous of containing their welfare budget to shift to a percentage system which will more equitably apportion those funds in fact allocated for welfare and also more accurately reflect the real measure of public assistance being given." *Rosado*, 397 U.S. at 413-14.

If the Texas eligibility determination procedure is lawful, however, no such incentive is in fact provided by § 402(a)(23).

The only "incentive" to abandon maximums inheres in the effect of the cost-of-living adjustment to such maximums on state budgets—assuming no change in the character of the AFDC population, total expenditures would have to be increased by approximately the amount of the increase to the retained maximums. However, if a reduced standard may be used to determine eligibility for assistance, this "incentive" is illusory. In order to maintain maximums without incurring greater expenditures, a state would merely have to begin using the maximum to determine AFDC eligibility rather than the standard of need. The result of such an approach would be to *reduce* the number of persons eligible for assistance, and to reduce the grants for all persons with some income, and in the process effect a possible *savings* in total state expenditures. If a state with dollar maximums adopted such a system of grant computation, it would "circumnavigate" the second effect of § 402(a)(23) since it would successfully avoid the incentive to abandon maximums

intended by Congress.[80] Indeed, this is precisely the situation in California, where an adjustment of the maximum grants by over 20% did not provide an incentive to switch to a percent reduction system since by using the maximum for the first time to determine eligibility California's costs were not increased.[81]

Finally, Texas' application of its percentage control factor to the standard of need prior to the consideration of income minimizes the last intended effect of § 402(a)(23), the "political" consequences.[82] When a state discloses that *it* is meeting only 50% of need it implies to the general public that all families will receive at least that percentage of their need *from the state* in the form of welfare payments. Texas, on the other hand, deprives many admittedly "needy" families of any assistance whatsoever from the state to aid them toward the goal of an adequate standard of living (as defined by the standard of need), and provides many others

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[80] That Texas abolished its maximums when it established the new budgeting procedure does not negate the force of our argument, since if HEW is right, Texas could as easily have chosen not to do so, and so § 402(a)(23) would not be a club at all. Moreover, Texas eliminated its maximums under threat of a court order. It acted after a three-judge court had been convened in *Robinson v. Hackney*, No. 68-H-294, S.D. Tex., a constitutional challenge to the maximum grant, and the three-judge court in *Williams v. Dandridge*, 297 F. Supp. 450 (D. Md. 1969) had ruled such maximums were unconstitutional. See also Sarazan dep., pp. 37-38, where appellee Sarazan recognized "practical necessities" created by the numerous lower court decisions on maximum grants; and Department of Public Welfare, Annual Report, 1969, p. 4. See *supra*, point I, at pp. 54, 68, 69.

[81] Analysis of Senate Bill No. 796, as amended, 1971 Session, California Legislative Analyst, Aug. 9, 1971.

[82] "While it leaves the state free to effect downward adjustments in the level of benefits paid, it accomplishes within that framework the goal, however modest, of forcing a State to accept the political consequences of such a cutback and bringing to light the true extent to which actual assistance falls short of the minimum acceptable." *Rosado*, 397 U.S. at 413.

with less than the 50% allegedly paid.[83] The "political consequences" of § 402(a)(23) contemplated by this Court in *Rosado* were those resulting from an accurate public acknowledgement of the percent of benefits which would be paid by the state to relieve unmet needs, *i.e.* the extent of the state's willingness to commit its resources to aid those it finds in need. These consequences are undercut if the state can maintain the appearance of meeting 50% of need when it has in fact established a new lower "standard" which merely redefines the level of living it will aid needy persons to attain, completely denies aid to any families above that "standard" and pays less than 50% of need to many others.[84] One might assume that Texas has gained political mileage from masking the fact that many families which have not reached a barely minimal standard of living are deprived of all welfare *and* medical assistance (which they cannot possibly afford since their income is not sufficient even for basic needs such as food and shelter.)[85] Indeed, Texas has obscured the true facts by calling the 50% level "recognizable needs" (101) purporting to embody a judgment that an AFDC family needs no more, and that the full standard is gravy.

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[83] Thus, assume the standard of need for a family of four is $200 per month. A family with no income will receive from the state under a 50% system $100. If that family has $50 outside income, it will receive from the state $50, or 25% of its determined need, and if the family has $100 income it will recieve no grant from Texas despite an admitted need of $50.

[84] Thus *Rosado* held that if Texas could not afford to increase AFDC payments under its adjusted standard it may "pare down payments" by "reducing the percent of *benefits paid*," 397 U.S. at 413. (Emphasis added.) It could not lower the standard itself.

[85] We should not lose sight of the fact that the 100% standard is by definition merely the amount deemed necessary by the state "to assure economic security." HEW Handbook, Pt. IV § 3120.

[86] Footnote 86 has been deleted.

B. HEW's Approval of the Texas Method was Inconsistent with Both the Legislative History of Section 402 (a)(23) and with Administrative Practice in Defining the AFDC Financial Eligibility Level as the Standard of Need.

Faced with a construction of § 402(a)(23) which it for some reason cannot tolerate (despite being the prime advocates of that view of the section before this Court), the Government finds support for its position in the fact that in addition to the Texas plan, it has approved eighteen other state plans which are similar to Texas' (a somewhat circular "bootstraps" argument). The *amicus* draws the inference that since an alleged "diversity of methods" existed when § 402(a)(23) was enacted, and since Congress evidenced no specific intention to end this diversity, it must be assumed to have approved it. *Amicus*, p. 8. Appellants believe that the agency's view of the legislative history is foreclosed by this Court's interpretation of the statute and its legislative antecedents in *Rosado*; that it is in any case completely unsupportable; and that its present position can be best explained as an after-the-fact rationalization of its approval of the Texas method—a rationalization offered despite clearly inconsistent prior pronouncements by the agency regarding the purpose of the standard of need and the proper methods of reducing payments in the public assistance programs. In sum, we shall demonstrate that HEW's view of the Texas AFDC plan represents an attempt to repeal § 402(a)(23).

1. *Legislative History of § 402(a)(23)*

Initially, it is well to remember that this Court's interpretation of § 402(a)(23) upon which we rely, *supra*, followed a review of the legislative history which resulted in little help for the Court. The Court characterized the section as "a child born of the silent union of legislative compromise," *Rosado*, 397 U.S. at 412, and considered as its "chief resources" the words of the statute and the "common assumptions" which must necessarily be made in the absence

of clear Congressional intent. *Ibid.* Thus, as the Government conceded in *Rosado*, "Congress could hardly have paid less attention" to § 402(a)(23). *Rosado amicus*, p. 3. Because of this lack of history the Government urged rejection of the district court's holding in *Rosado* that the section mandated an increase in AFDC payments. Yet it now seeks to rely on the absence of history to convince the Court that Congress legislated a radical departure from previous understanding of the function of the standard of need in determining public assistance eligibility. The agency wants it both ways.[87] What legislative history there is, however, indicates that appellants' interpretation of § 402(a)(23) is correct.

First, while HEW's latest tabulation shows 23 states using a percentage reduced standard for determining AFDC eligibility,[88] rather than the standard of need itself, when Congress was considering the 1967 amendments only four states used such a method. See NCSS Report D-3, September 1967, (Table 3); NCSS Report D-3, October 1968 (Table 3).[89] Thus, in light of the scanty attention to § 402(a)(23), it is unlikely that Congress would have been aware of this "diversity of methods" on its own. It is clear, however, that HEW never educated the Congress with respect to the budgetary

[87] As the Court noted in *Rosado*, "in view of Congress' failure to track the Administration proposals and its substitution without comment of the present compromise section, HEW's construction commands less than the usual deference that may be accorded an administrative interpretation based on its expertise." 397 U.S. at 415.

[88] HEW filed with its *amicus* brief in *Whitfield v. King*, No. 3330-N, M.D. Ala., a case similar to this one, an updated (9/71) version of the appendix to its *amicus* filed in this case last May.

[89] In the 1967 report, Colorado, Ohio, South Dakota and Virginia were listed under the heading "Payment plus other income represents specified percent of requirements." In the 1968 report, Colorado, South Dakota, Virginia, and West Virginia were so listed. Of course, while we must concede that these states were evidently using the Texas method in 1967, that alone is no indication of the validity of their approach.

methods in actual use. Indeed, everything placed before the Congress by HEW in 1967 indicated that the standard of need *always* determined eligibility for a money payment in AFDC.

The Under Secretary of HEW, for example, in testimony before the Senate Finance Committee, explained:

> "*Present law requires that eligibility to receive public assistance payments* be based on State estimates of the minimum amounts required for food, clothing, shelter, and other needs [i.e. the standard of need]." (Emphasis added.) Testimony of Wilbur Cohen, Hearings on H.R. 12080, Comm. on Finance, 90th Cong., 1st Sess., Pt. I, p. 255 (1967).

Moreover, in the supporting material provided Congress with respect to its original proposal that states be required to pay 100% of need (H.R. 5710), the Administration included figures showing AFDC cost standards[90] and the "highest monthly amount payable for basic needs" in the various states. Only three methods for determining the money payment were described:

(1) use of a dollar maximum on payments to recipients;

(2) application of a percentage reduction "to the amount of determined need" which is the need standard less income; and

(3) payment of 100% of the cost standard

Section-By-Section Analysis of H.R. 5710, Comm. on Ways and Means, Committee Print, 90th Cong., 1st Sess. (1967), p. 37. *None of the states meeting less than full need were identified by HEW as applying a percentage reduction to the standard itself.*

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[90]See *infra* at pp. 103-107 for a discussion of the significance of the "cost standard" as identified in this report to Congress, and HEW's present position regarding a "payment standard" (e.g. Texas' 50% level).

Finally, the interpretation of legislative history urged by the Government does not explain the elimination of the annual-updating requirement by the Conference Committee. The bill reported out of the Senate Finance Committee required an initial updating of AFDC standards by July 1, 1969, and an *annual* updating thereafter. S. Rep. No. 744, 90th Cong., 1st Sess., p. 293 (1967). The Conference Committee, obviously viewing the updating requirement as having practical significance, maintained the initial updating requirement but eliminated the provision for annual adjustments. Conf. Rep. No. 1030, 90th Cong., 1st Sess., 1967 U.S. Code Cong. and Adm. News 3179, 3208-09. If § 402(a)(23) is not read as requiring the updated standard of need to be used to determine AFDC eligibility, it is not clear at all why the annual updating should have been a significant bone of contention. Obviously the provision was understood to have teeth, for Congress rarely, if ever, legislates with *only* a subtle political motive in mind.

Given the total absence of support in the legislative history for the Government's position, and its prior descriptions of the standard of need's utility in describing AFDC eligibility before this Court, it will be useful to trace the agency's position chronologically, for a close reading of events will disclose the political as opposed to legal or legislative basis for its view.

2. *Prior HEW Pronouncements on the Function of the Standard of Need as the Determinant of AFDC Eligibility.*

It is worth emphasizing that this Court's description of the standard of need as the "yardstick" for determining eligibility for AFDC payments was not a departure from long standing practice and federal policy, but that, indeed, such a purpose was the very reason federal law required that a standard be created. As noted earlier, unless the standard were so used, HEW could not have told the Court, nor could the Court have found in *Rosado* that the

cost-of-living updating required by § 402(a)(23) was intended to increase the numbers of persons financially eligible for assistance.

From the very inception of the Social Security Act it was understood that categorical assistance, including AFDC, would only be given to those in need. The Act, as originally introduced in 1935, provided that the states must furnish sufficient assistance which, when combined with other income, would enable "reasonable subsistence" in health and decency.[91] That is states would be required to pay in full the amounts established in their need standards, and, of course, to aid everyone eligible under those standards. This provision was eliminated from the bill reported out of the House in deference to state's rights advocates and was not resurrected in the Senate or by the Conference Committee.[92] Hence came the power of the states to establish limits on the amount of aid which the state would be required to pay. However, the Social Security Board interpreted the Act as requiring state programs to take need into account in determining eligibility for assistance, and to provide such assistance according to determined need.[93] The authority for its position was § 401, 42 U.S.C. § 601, which stated as the Congressional purpose the provision of financial assis-

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[91] H.R. 4120, 74th Cong., 1st Sess. § 204 (1935). See the testimony of Dr. Witte the primary administration spokesman, in House Comm. on Ways and Means, Economic Security Act, Hearings on H.R. 4120, 74th Cong., 1st Sess. (1935) at 125-26, 262-63.

[92] Witte, *Development of the Social Security Act* (1962); DeForest, Rubin, Wynia, *Legislative History of the Aid to Families With Dependent Children Program*, Bur: Social Science Research (1970), p. 48. "'If 'adequacy' were set as high as the [federally] determined 'decency and health' standard would require, southern states would [have been] obliged to contribute to the removal of a central element of the 'way of life' in the Deep South, founded on Negro economic deprivation and political impotence."

[93] See, *e.g.*, House Committee on Appropriations, Hearings on Supplemental Appropriations Bill for 1936, 74th Cong., 2nd Sess., (1936), pp. 99-100.

tance to "needy" children. Under this interpretation, proposed state welfare plans under the Act were rejected which provided for grants to persons not "in need," see, e.g., Minutes of the Social Security Board, February 4, 1938,[94] or which provided for a flat amount payable to all persons meeting the need test without considering the particular need of the individual in light of his currently available income, see, e.g., Minutes of the Social Security Board, October 16, 1936. Individual need determined with reference to the state's standard of need was the federally-required keystone for determining the amount of aid payable.

In 1939, § 402(a)(7) was added to the Act as the recommendation of the federal agency, thus making this requirement even more specific. That section now provides that

> "except as may be otherwise provided [in (a) (8)] the State agency *shall, in determining need,* take into consideration any other income and resources of any child or relative claiming aid to families with dependent children. . ." 42 U.S.C. § 602 (a)(7).

The federal agency has interpreted the Act, so amended by § 402(a)(7), as an expression of Congressional will to provide "assistance payments. . .to *supplement* the income and resources of an individual when these are inadequate to provide him an opportunity to secure for himself the State's defined standard of economic security for people in need." HEW *Handbook of Public Assistance Administration,* Pt. IV, § 3120. HEW has made clear that one is "not required to be completely destitute in order to be eligible for assistance." *Ibid.* Thus, while Congress provided in the original legislation that the amount of aid could be limited, there is nothing in the Act, or HEW's early interpretation of the Act's purposes, which suggests that limitations on the aid paid may be applied in such a way as to prevent *any* sup-

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[94] These minutes were made available to counsel by the Office of the Commissioner, Social Security Administration.

plementation whatsoever for a class of admittedly needy families. On the contrary, HEW regulations and policies have consistently implemented § 402(a)(7) by requiring that all persons "in need" under the state test be provided *some* supplementary assistance. As we shall demonstrate, those regulations and policies accomplish this result by an *explicit* definition of the function of the standard of need as the financial eligibility standard for AFDC, and they compel the conclusion that Texas' use of a percentage reduced standard for this purpose is inconsistent therewith.

First, it is obvious that individual "need" could not be determined as required by § 402(a)(7) without a standard of need. As HEW has told this Court on two occasions, "[O]ne could hardly describe who are 'needy' individuals *for purposes of State eligibility* and Federal matching unless there were a standard of need." (Emphasis added.) Brief for the United States as Amicus Curiae, *Wyman v. Rothstein*, No. 896, O.T. 1969, p. 8; Memorandum for the United States as Amicus Curiae, *Wyman v. Boddie*, No. 1262, O.T. 1970, p. 4. HEW has long interpreted the statutory command that "other income" be considered in the determination of needs as follows:

> "The plan must provide that *all income and all resources* regularly available. . . will be evaluated and *taken into consideration, by comparing them with the State's standard of assistance to determine the amount of assistance needed. . .*" HEW *Handbook of Public Assistance Administration*, Pt. IV, § 3131.5 (emphasis added). See also *Id.* at § 3120.

Further, HEW has made explicit that this needs determination must be directly related to the computation of the amount of the assistance payment: "The plan must provide that the payment is based on the determination of the amount of assistance needed." *Id.* at § 3131.8. Lest there be any claim made by HEW that this language in its Handbook was not intended to be binding, we note that the 1969 codification of these HEW regulations in the federal register incorporates these requirements. Thus, state AFDC plans *must*

> "Specify a *statewide standard* . . . *to be used in determining* (a) the *need* of applicants and recipients *and* (b) the *amount of the assistance payment.*" 45 C.F.R. § 233.20(a)(2) (emphasis added).

Further, state plans *must* provide that

> "*in establishing financial eligibility* and the amount of the assistance payment: (a) All income . . . will be considered *in relation to the State's standard of assistance*. . ." 45 C.F.R. § 233.20(a)(3)(ii) (emphasis added).

Finally, AFDC payments *must* "be based on the determination of the amount of assistance needed." 45 C.F.R. § 233.20(a)(3)(viii). It is apparent, then, that the standard of assistance has long been intended to function as the sole determinant of financial eligibility for AFDC, and thus *Rosado* was clearly correct to so define it in the course of its search for meaning to § 402(a)(23).

Given the obvious fact which confronts appellants, namely that the Solicitor General has filed a brief in opposition to appellants' position on their § 402(a)(23) claim, it will be useful to demonstrate that HEW, in its literature distributed to State welfare agencies, and with only one exception[95] which will be discussed *infra*, has consistently interpreted its regulations as we do here.

Thus, in 1963 its Bureau of Family Services distributed to all state agencies and other interested groups via State Letter No. 678, a publication entitled "Yardstick for Need,"[96] intended to "describe the process of determining need." *Id.* at "forward." According to this booklet, "[d]etermination of 'need' . . . is . . . the basic . . . [factor] in establishing the eligibility of an applicant for assistance." *Ibid.* Further, "[a] single yardstick for measuring a person's need and for evaluating his income and resources is used," *Id.* at 1, and that "yardstick for need is used to determine whether the fam-

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[95] HEW State Letter 1074, Jan. 8, 1970.

[96] Edited by Gladys O. White, 1963.

ily qualifies for a money payment and if so, how much will it be." *Id.* at 4. Finally, as if the above were not sufficiently clear with regard to the state's responsibility for using its standard for determining eligibility, the federal agency advised that a recipient's "income must be applied against *all his needs as measured by the agency's standards.*" *Id.* at 14 (emphasis added). In addition, the HEW statistical division in a periodical report entitled "State Maximums and Other Methods of Limiting Money Payments To Recipients" sets out the agency's view of the states' role in determining eligibility as follows:

> "Each State . . . establishes its own standard *by which eligibility for financial assistance and the amount of the money payment are determined.*" NCSS Report D-3 (October 1970), HEW Social and Rehabilitation Service, National Center for Social Statistics, p. 1 (emphasis added).[97]

These HEW publications are consistent with the procedures set out in the agency's regulations for the determination of need and the amount of payment. Thus, the "method used in determining needs . . . must be one of the three methods described in [HEW's] 'Guides and Recommendations' or a comparable method."[98] 45 C.F.R.

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[97] This report has contained a similar description of the standard of need since at least 1965. See report of same title published by the Welfare Administration Bureau of Family Services Division of Program Statistics and Analysis, April 1965. The Bureau of Family Services, Welfare Administration is now the Social and Rehabilitation Service, Assistance Payments Administration, and the functions of the Division of Program Statistics and Analysis is now performed by the National Center for Social Statistics (NCSS).

[98] "Guides and Recommendations" is HEW *Handbook of Public Assistance Administration*, Supp. A. Section A-3100 notes that the relevant material relating to needs is included in a booklet entitled "Simplified Methods for Determining Needs" previously lodged with this Court by the Solicitor General in *Wyman v. Rothstein*, No. 896, O.T. 1969, and distributed to state agencies with State Letter 712, February 5, 1964.

§ 233.20(a)(2)(iv). Each of the three methods outlined by the agency provides first for the consideration of income in relation to *total* requirements, *i.e.* the standard of need, and requires second the computation of a budgetary deficit (requirement less income) from which the grant may be determined. If any one of the federal procedures are followed, reductions in payment must necessarily be accomplished in a third step by reducing this budget deficit. Reductions to the standard of need prior to consideration of income was not contemplated by the HEW procedures.[99] Finally, as noted earlier, HEW has previously appeared before the court in *Rosado*, *Boddie* and *Rothstein* with the view that the standard of need is the yardstick, or eligibility level for public assistance.[100]

3. *State Letter 1074*.

HEW State Letter 1074 is the first policy issuance in conflict with prior interpretation of the standard of need as the eligibility yardstick. In pertinent part it reads as follows:

> "After determining the net family income actually available (earned income less expenses reasonably attributable to earnings, plus all other income) the

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[99] This is consistent with HEW regulations cited earlier which require payments to be based on the determination of the amount needed (*i.e.* budget deficit), 45 C.F.R. § 233.20(a)(3)(viii), and the HEW Handbook provision which preceded the codified regulation and provided for adjustments "if assistance funds are not sufficient or if maximums preclude the agency from making payments *in accordance with the amount of assistance determined to be needed.*" *Handbook*, Pt. IV, § 3131(7) (emphasis added).

[100] As recently as late November, 1971, HEW has publicly defined the standard of need as the level used to determine eligibility. In a pamphlet apparently distributed to interested groups (not just state agencies) HEW said: "Each State establishes its own 'need standard'. The amount required for the necessities of family living . . . A state will use its 'need standard' as a base for determining eligibility." HEW, Social and Rehabilitation Service, "Myths v. Facts," SRS 71-127, p. 1.

> State can *apply that amount to the assistance standard or to the payment level. However,* pursuant to 402(a)(8) of the Act, *if the total net family income is less than the assistance standard the family is eligible* and the State must use the method for disregarding earned income in accordance with SRS Regulation 233.20(a)(7).
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> * * * * *
>
> The non-disregarded balance thereof, plus any other non-exempt income, is to be *applied either to the assistance standard or the payment level* in accordance with the State's policies." (Emphasis added.)

Thus, it is this document which provides the underpinning for the agency's view before this Court in this case. In sum, (1) if a family's net income is less than the state's standard of need for that size family, *the family is eligible,* and the applicable income disregards of § 402(a)(8) must be applied;[101] (a) available income (unearned income plus the non-disregarded balance of earned income) may be subtracted from *either* the standard of need, or the "payment level" (*i.e.* the reduced standard).[102] The necessary result is that some persons with income who nonetheless have a "need" under the state "yardstick", the standard of need, are denied aid although concededly "eligible", and *all* persons with income who *do* qualify for aid under 1074 receive payments totally unrelated to the "amount of assistance determined to be needed."[103]

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[101] The consequences of the agency's characterization of the family as "eligible" are significant. See discussion of § 402(a)(10), *infra,* section C.

[102] The "payment level" is the highest money amount which a family with no income can receive—it may be a maximum grant or percentage reduction, or some other level below the standard of need.

[103] The amount of assistance "needed", is the difference between the standard of need and the recipient's available income.

As previously noted, State Letter 1074 is at sharp variance with prior agency definitions of the standard of need in its regulations and policy issuances to the state agencies.[104] An analysis of the events immediately preceding State Letter 1074 provides some prespective into the agency's purpose (which we believe was to undermine § 402(a)(23)). After reviewing that history we shall demonstrate the inconsistency of State Letter 1074 with the decision of this Court in *Engelman v. Amos*, 40 U.S.L.W. 5216 (Nov. 9, 1971), with HEW's position in *Amos* as expressed in its *amicus* in that case and ultimately, with § 402(a)(23).

Our starting point must be a recognition of the fact that prior to the 1967 amendments to the Social Security Act states enjoyed almost untrammeled freedom in allocating their welfare funds. Thus, this Court observed in 1968 that states had the "undisputed power" under the Act "to set the level of benefits and the standard of need." *King v. Smith, supra* 392 U.S. at 334. See also *Dandridge v. Williams, supra*, 397 U.S. at 478 (1970). Thus, absent any restriction on this power, appellants' claim would be an academic one—if a state could freely reduce its standard of need, it would be irrelevant as a practical matter what amount it actually used to determine financial eligibility, since such a state could simply lower its need standard to the financial eligibility level to meet any objections to its use of a reduced standard for such a purpose.

However, this Court specifically held in *Rosado* that the standard of need may *not* be reduced:

> "Section 402(a)(23) invalidates any state program that substantially alters the content of the standard of need in such a way that it is less than it was prior to the enactment of § 402(a)(23). . ." *Rosado*, 397 U.S. at 419.

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[104] It is interesting to note that this policy was issued on January 8, 1970 after the Government filed its *amicus* in *Rosado* and after argument in that case, but three months prior to the decision of the Court (April 6, 1970).

Apart from a difference of opinion as to whether or not all special needs were necessarily part of a state's standard, HEW had earlier reached the same conclusion, namely that § 402(a)(23) imposed a "floor" under AFDC standards. See 45 C.F.R. § 233.20(a)(2)(ii) (which proscribes "a reduction in the content of the standard").[105]

At the same time as the imposition of the restriction of state latitude in setting standards of need, HEW had also begun efforts to require states to accurately define and report their standards. The statistical division of the federal agency, prior to July 1969, had requested all states to identify for reporting purposes their cost standards. The results of the survey were coincidentally published in July, 1969, simultaneously with the effective date of §§ 402 (a)(8) and 402(a)(23), the first two federal intrusions into the states' AFDC need determinations. That report discloses the agency's interpretation of what a standard of need is:

> "The *assistance standards* reported by states were to be those in use as of July 1969 *to determine eligibility for a money payment* and the amount of such payment for which an individual or family is determined to be eligible. Otherwise stated, the amounts were to represent the *de facto* operating *cost standards actually governing entrance into the program* at a particular point in time, as distinguished from a higher theoretical standard which the State has defined and recognized as a goal." NCSS Report D-2 (July 1969), p. 1 (emphasis added).

According to the agency, then, the *assistance standards are those standards which determine eligibility;* while higher theoretical amounts were recognized to exist, they served no practical function except perhaps one relating to public relations, and were not considered by the agency to be standards

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[105] The "floor" is the standard in effect on January 2, 1968 plus an additional amount to account for the cost-of-living adjustment to that standard.

of assistance.[106] Thus, in the summer of 1969, the agency had made clear both that the AFDC standards of need for each state was that level used by the state to govern entrance into the program, and that no reductions in that level would henceforth be tolerated.

The pressure on HEW from state governments unwilling to suffer the consequences of increased AFDC eligibility began to mount, however. While § 402(a)(23) became law in January of 1968, and the states had been given 18 months to comply, as of July 31, 1969, a month after the deadline, forty-one states were designated by HEW as having failed to comply with the updating requirement. HEW, Status of Compliance with Selected Plan Requirements (1969), cited by Rabin, "Implementation of the Cost-of-Living Adjustment for AFDC Recipients: A Case Study in Welfare Administration," 118 Penn. L. Rev. 1143, 1154 n. 41 (1970). HEW's public explanation for its failure to enforce compliance was that "to impose sanctions for state inaction was against both HEW's and NWRO's[107] interests, for the only available sanction was the termination of federal funding, which meant the termination of payments to AFDC recipients." Rabin, *supra* at 1153.[108]

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[106] This view is, of course, consistent with the HEW regulations cited above, see pp. 96 to 98.

[107] NWRO is the National Welfare Rights Organization. NWRO was an active participant in negotiations with HEW on § 402(a)(23) and sought to persuade HEW to obtain state compliance with the statute. NWRO was an original plaintiff in the *Rosado* litigation.

[108] This has frequently been the agency's explanation for tolerating lawless conduct by state welfare departments. See Appendix, *Rosado v. Wyman*, No. 540, O.T. 1969, p. 131. See also, Appendix to opinion of Douglas J., concurring in *Rosado v. Wyman*, 397 U.S. at 429-30. While we do not urge precipitous withholding of funds to coerce compliance, there comes a point in time when respect for federal law is diminished by tolerance of its violation. Moreover, we note that with respect to the four states HEW finally called to conformity hearings in 1970 under 42 U.S.C. § 604 because of non-compliance with § 402(a)(23), while HEW did order termination of

The federal agency did not even distribute its policy instructions to the states regarding implementation of § 402(a)(23) and the HEW regulation, 45 C.F.R. § 233.20 (a)(2)(ii), until October 1969, four months *after* compliance had been required. See Unnumbered HEW State Letter, October 17, 1969, reproduced in the appendix to the Government's *amicus* in *Rosado*. We may assume then that the agency was confronting a difficult question in the summer of 1969—should § 402(a)(23) be enforced as written, with its attendant fiscal and political consequences, or should it be ignored? In a brief submitted to the federal district court in the District of Columbia in response to a suit brought by NWRO to obtain enforcement of § 402(a)(23) by HEW, the Government explained its failure to obtain prompt compliance as follows:

> "[T]he factual background against which Congress had passed the updating provision had changed radically. Section 402(a)(23) was added to the Social Security Act at the same time as the work incentive program of Title IV, Part C. It was Congress' understanding that this and other provisions of the amendments would serve to stabilize, or reduce, the number of people on the AFDC rolls. See H.R. Rep. No. 544, 90th Cong., 1st Sess. 107, 110 (1967). *In such a context, an updating provision, as argued by plaintiffs, which might increase the number of recipients and require additional expenditures, would not impose too great a burden on the States.* Subsequent experience, however, showed a different factual situation. During the time between the passage of the 1967 Amendments and July 1, 1969, the AFDC caseload in most States increased, rather than dwindled, as Congress had expected. *In a national election year, the States were forced to scrutinize rising welfare appropriations very closely.*

AFDC funds; each of those states came into compliance before the actual loss of funds. See Hearings called by the Social and Rehabilitation Service of HEW on the question of the conformity of the Missouri, California, Indiana and Nebraska State Plans under Title IV.

> *Thus, compliance with section 402(a)(23) was demanded in a factual setting neither the Congress or the States had anticipated. In this context, the section acquired a significance for State AFDC programs not previously ascribed to it.*" Brief in Opposition to Plaintiffs' Motion for Summary Judgment and in Support of Defendant's Cross-Motion to Dismiss or for Summary Judgment, *NWRO v. Finch*, No. 2954-69, D.D.C., p. 24 (emphasis added).

Thus, political considerations, and pressure from state agencies unwilling to face the consequences of expanded welfare eligibility, were primary factors in the HEW decision-making process.[109]

It is thus no great surprise, in such a context, that by April 1970, 23 states, unwilling to accept responsibility for the additional eligibles, were using a reduced standard for determining AFDC eligibility (compared to only four in 1968).[110] It was the states' open refusal to obey § 402 (a)(23) and HEW's reluctance to require obedience, that explains State Letter 1074. Thus, for the first time, HEW identified a "payment standard" which could be used to determine AFDC eligibility, as separate and distinct from the standard of need which was theretofore defined by HEW as the eligibility level. See NCSS Report D-2, July 1970.[111] HEW had to redefine its terms since what it had

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[109] Surely if the facts had changed by 1969, the federal agency might have asked Congress to amend or repeal § 402(a)(23). It did not.

[110] Counsel was provided with this information by the Commissioner of the Assistance Payments Administration, Social and Rehabilitation Service, HEW, by letter of November 4, 1971, in response to a request for such information.

[111] HEW redefined its terms in July 1970 as follows:

> "1) *The full standard:* This is the amount with which income from all sources is compared to determine whether or not financial eligibility exists. Use of the full standard for this purpose (where this is different from the payment standard) is mandatory only for AFDC applicant families

earlier shown the Congress in support of its full needs proposal (H.R. 5710) was the actual *de facto* eligibility standards in use in the various states, and thus it was obviously *these amounts* which Congress required to be updated by § 402 (a) (23). Compare Section-By-Section Analysis of H. R. 5710, Comm. on Ways and Means, Committee Print, 90th Cong., 1st Sess., p. 37 with NCSS Report D-2, July 1969, p. 1, and NCSS Report D-2, July, 1970, p. 1.[112] Texas' present 100% standard of need is its *de facto* eligibility standard of January 2, 1968[113] (i.e. its "amounts used to determine need" on that date), as updated to comply with § 402 (a) (23). Surely by updating its eligibility standard and then putting it aside and creating an entirely new eligibility standard, Texas has not satisfied the command of § 402 (a) (23). Such a "circumnavigation" is as effective as the one chosen by New York to evade its responsibilities under § 402 (a) (23).

State Letter 1074 not only radically departed from HEW policies set prior to its issuance in January, 1970, but it continues to represent an aberation in agency policy. Again, without specific reference to § 402 (a) (23), in *Engelman v. Amos*, 40 U.S.L.W. 3216 (Nov. 9, 1971), HEW took the position that the determination of the amount of assistance payment must be directly related to the determination of individual need. In *Amos*, New Jersey had implemented an AFDC regulation which it claimed was a

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with earned income who have not received assistance in any one of the four preceding months.

2) *The payment standard:* This is the amount from which income 'available for basic needs' is subtracted to determine the amount of assistance to which an individual or family is entitled."

[112] The NCSS reports indicate that the "cost standards" shown Congress in 1967 were the *de facto* standards governing entrance into the program.

[113] This is the date of enactment of § 402 (a) (23) and the date which that section fixes upon in setting a floor under the standard of assistance. *Rosado*, 397 U.S. at 419.

valid method for reducing AFDC payments. Under that provision, the state defined an "administrative ceiling" for each size family; that "ceiling" operated to deny AFDC eligibility to any family whose adjusted gross income (income not subjected to the disregards of § 402 (a) (8)) was greater than the ceiling, and to limit AFDC payments for those who remain eligible to the difference between the ceiling and income.[114] A three-judge District Court invalidated this provision as being inconsistent with § 402 (a) (8). *Amos v. Engelman*, No. 1340-69, D.N.J., July 6, 1970.

On appeal the State argued that it had fully complied with §§ 402 (a) (7), (a) (8) which in its view related only to "determining need." New Jersey claimed that the challenged regulation merely was a form of *payment* limitation authorized by *Rosado* and *Dandridge*. HEW urged affirmance. The federal agency rejected New Jersey's characterization of its budgeting method as a reduction in *payments*. HEW based its position on its regulations implementing §§ 402 (a) (7) and (8) (relied upon by appellants here, see *supra* pp. 96-98) which "make no . . . distinction" between "determining need and reduction of benefits." Brief for the United States as Amicus Curiae, *Engelman v. Amos*, No. 931, Term 1970, p. 8. HEW argued that under the Act and its regulations, "the process of 'determining need' includes as a component part the application of any reduction of benefits." *Id.* at 9.

State Letter 1074, similarly permits the bifurcation of the budgetary process. Texas, for example, following the suggestion in State Letter 1074, first determines need by comparing income to the "full standard," or its standard of need. As required by that document, all families with income below that standard are "eligible", and if some of

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[114] The amount of payment would be 100% of the budgetary deficit computed without reference to the ceiling, and taking into consideration the exemptions of § 402(a)(8), or the "maximum" described above, computed by use of the ceiling, whichever was lower.

their income is earned, qualify for the income exemptions provided by § 402 (a) (8). Once the eligibility process is concluded, however, and need for assistance determined by the welfare department, an entirely separate standard is used to compute the amount of payment. Texas, again following State Letter 1074, subtracts all non-exempt income from the "payment standard" (or 50% of the standard of need) in order to arrive at the amount of the grant. Payments in Texas, just as in New Jersey, are not related to the determination of the amount of assistance needed. As HEW noted in its *Amos* brief (p. 9), "the established means for reducing payment levels . . . operate directly on the amount the state is to pay—as by taking a percentage of the amount, or setting a ceiling on it." Texas' method operates on the standard of need, not the individually determined amount needed, or as HEW calls it, "the amount the state is to pay".

Appellants suggest that the Department's *Amos* position (affirmed by this Court) is not compatible with State Letter 1074 and its position in this case,[115] and is a further example of HEW's unwillingness to enforce § 402 (a) (23) consistently with the rest of the Social Security Act.

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[115] It is no answer to argue, as HEW did in its *amicus* in this case (p. 12) that the difference between Texas and New Jersey is that "the Texas method is applied in all benefit calculations", while New Jersey restricted its rule only to those with earned income. Even assuming that would be a meaningful distinction, which we do not, Texas' method too applies differently to persons with earned income as opposed to persons with unearned income. For the former, Texas uses the 100% standard of need to determine eligibility for financial assistance, while the eligibility of the latter group is measured by the percentage reduced standard.

C. Other Provisions of the Social Security Act Evidence a Congressional Intent that All Categorically Eligible Persons with a Financial Need under the State's Standards Receive Some Assistance.

Congressional assumption that the standard of need will be determinative of who gets a cash payment, and that therefore all "needy" and otherwise eligible families must be receiving AFDC[116] (*i.e.* those with income less than the standard), is manifested by specific language in the Act, and is confirmed by considerable legislative history. Acceptance of HEW's and Texas' interpretation of § 402(a)(23) would thus not only nullify that section but would also destroy the symmetry among the provisions of the Act.

In 1967, at the same time Congress enacted § 402(a)(23), it added to the AFDC program a mandatory provision requiring states to disregard a portion of the earned income of AFDC recipients in determining the extent of their need for public assistance. § 402(a)(8), 42 U.S.C. § 602(a)(8). This was the provision at issue in *Engelman v. Amos, supra*. The purpose of this provision, which was a "key element" in the federal work incentive legislation enacted by the Ninetieth Congress, Comm. on Finance, Report on H.R. 12080, S. Rept. No. 744, 90th Cong., 1st Sess. (1967), p. 157, was to encourage AFDC recipients to seek private employment and perhaps eventually end their need for public assistance. *Id.* at 158. See *Connor v. Richardson*, 314 F. Supp. 364 (N.D. Ill. 1970), *aff'd. mem.* 400 U.S. 1003 (1971). The income exemption is thus required to be applied in the determination of need only for dependent children and their caretaker relatives who are "receiving aid." 42 U.S.C. § 602(a)(8). The Senate Finance Committee made absolutely clear to whom the provision would apply:

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[116] A family receives "aid to families with dependent children" when it receives a *money payment*. 42 U.S.C. § 606.

> "[The exemptions] are to become available for AFDC only with respect to persons whose income was not in excess of their needs as determined by the State agency without the application of this provision itself. That is, *only if a family's total income falls below the standard of need will the earning exemption be available.*" Comm. on Finance, Report on H.R. 12080, S. Rept. 744, 90th Cong., 1st Sess. (1967), p. 159.

Thus, Congress understood that those with income below the standard of need would be "receiving assistance," and hence would qualify under § 402(a)(8) for the earnings disregards. Under Texas' method, of course, many families with income less than the standard of need do *not* receive aid, and thus should not qualify for the earnings exemption. But under State Letter 1074 they do.

Many other provisions of the Act evidence a similar Congressional intent that all needy families must be receiving some assistance. Thus, social services designed to foster the strengthening of family life which we discussed in Point I, must be made available to each dependent child and relative "who receives aid to families with dependent children." 42 U.S.C. §§ 602(a)(14), (15). Employment training programs also added with the 1967 amendments are open only to those children over 16 and their relatives who are "receiving aid." 42 U.S.C. §§ 602(a)(19), 632. Medical assistance under Title XIX of the Act is mandatory only for "individuals receiving aid or assistance" under one of the cash assistance programs. 42 U.S.C. § 1396a(a)(10). It is likely, as in the case of § 402(a)(8), that Congress keyed these provisions to those receiving aid since it assumed (and intended) that all persons with income below the welfare standard of need were receiving aid.[117] Finally, federal law requires

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[117] These "concomitant services" were deemed by Judge Wisdom as the primary thrust of the 1967 amendments, and the availability of those services to more families because of their increased eligibility following the § 402(a)(23) updating was the basis for his construction of § 402(a)(23). See *Lampton v. Bonin*, 304 F.Supp. at 1389, and *supra* p. 83.

that AFDC payments be furnished "to all eligible individuals." 42 U.S.C. § 602(a)(10); *Dandridge v. Williams, supra.* Here too Congress intended that those children who were both needy and dependent under the state's standards would receive aid.

Appellants will focus on two of the most important of these federal statutes in order to demonstrate that Congress intended the standard of need to be the "yardstick" for determining AFDC eligibility – the Medicaid provisions of Title XIX and § 402(a)(10), requiring payments to all eligible individuals.

1. Medical Assistance

States participating in the Title XIX medicaid program are required to provide medical assistance to the "categorically needy." That group is defined basically as persons *receiving aid* under one of the categorical assistance programs, 42 U.S.C. § 1396a(a)(10)(A).[118] However, the states were encouraged to provide medical assistance to individuals not receiving cash public assistance by the availability of federal matching on an optional basis for the cost of care to the "medically needy" or "medically indigent." 42 U.S.C. § 1396a(a)(10)(B). See U.S. Senate, Comm. on Finance, Report to Accompany H.R. 6675, H. Rept. 404, Pt. I, 89th Cong., 1st Sess. (1965), p. 9. The statute defines such persons as those "who would, *if needy*, be eligible for aid or assistance" under one of the cash assistance programs (*e.g.*, AFDC) and who meet more liberal income tests. 42 U.S.C. § 1396a(10)(B)(i) (emphasis added). Thus it would appear that Congressional authorization for a more liberal medicaid program was based on the assumption that those who *were* needy under state standards were already

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[118] Also included as "categorically needy" are persons who would have received aid but for a restrictive eligibility requirement in such a program which is specifically prohibited under Title XIX. 42 U.S.C. § 1396a (b).

covered by the mandatory portion of Title XIX since they were already "receiving aid" under one of the cash assistance programs. See also 42 U.S.C. § 1396a(a)(17)(B). Indeed, the report of the Senate Finance Committee specifically refers to the "medically indigent" as "persons who come within the various categories of assistance except that their *income and resources are sufficient to meet their needs for maintenance.*" *Id.* at 77. Again in 1967, contemporaneously with the enactment of § 402 (a) (23), that Committee described the "medically indigent" as "those whose income is too high for them to be characterized by the State as in need of welfare." U.S. Senate, Comm. on Finance, Report to Accompany H.R. 12080, S. Rept. 744, 90th Cong., 1st Sess. (1967), pp. 176-177. The categorically needy, then, persons who are *"receiving aid,"* are those who *are* "characterized by a State as in need of welfare."[119] In Texas, however, many families are denied both AFDC *and* medicaid despite incomes which are too low to meet their basic subsistence needs, families which are characterized by Texas as "in need of welfare," because of a combination of Texas' refusal to determine eligibility for

[119] The description of the "medically needy" in Title XIX was borrowed from the previous medical assistance program established by Congress, Kerr-Mills, 42 U.S.C. § 301 *et seq.* Medical assistance under Kerr-Mills was available (prior to Title XIX) to persons over the age of 65 who were "not recipients of old age assistance." Thus Kerr-Mills sought to liberalize public assistance medical care, available in the form of vendor payments to recipients of OAA, by "reach[ing] beyond the group of those eligible under old age assistance so as to encompass those persons with sufficient resources for their usual needs but not enough for medical costs." Performance of the States – Eighteen Months of Experience With the Medical Assistance for the Aged, 87th Cong., 2d Sess. (1962), p. 7. The individuals "with sufficient resources for their usual needs" were considered by the 1960 Congress to be "those persons not on relief who, presumably, have sufficient resources to meet their ordinary living expenses." *Id.* at 1. Thus even under Kerr-Mills Congress assumed cash public assistance was being provided to aged individuals who were "needy" under state standards, and thus they were covered by medical vendor payments under Title I and did not require Kerr-Mills protection.

an AFDC payment by reference to its assistance standard, and because of its choice not to cover the medically needy. The Texas method thus results in the anomaly that persons who have insufficient income to provide themselves with basic maintenance needs, will be able to obtain necessary medical assistance only if Texas determines to exercise its option to create a medically needy program, a program designed to offer relief from medical costs to those who have sufficient income to meet their basic needs.

Federal regulations promulgated for the medicaid program support our view. They demonstrate, as did HEW's development (without reference to § 402(a)(23)) of accurate reporting of state cost standards, *supra* at p. 103, that HEW's view of the function of the standard of need as the benchmark for determining AFDC eligibility is identical to appellants', except when the agency is specifically concerned with the effect such a position would have on the states' obligations under § 402(a)(23).

Thus HEW regulations require that, to determine medicaid eligibility of the groups of "categorically needy" individuals, "the financial eligibility conditions of the pertinent financial assistance plan [*e.g.* AFDC] will apply." 45 C.F.R. § 248.21(a)(1)(i), 36 Fed. Reg. 3871 (Feb. 27, 1971). With respect to those families who are receiving cash assistance, this requirement is satisfied simply by automatically assuming medicaid eligibility.[120] As noted above (note 118), however, under Title XIX states are required to provide medicaid not only to those receiving AFDC payments, but also to those who could not receive AFDC because they could not satisfy a restrictive AFDC eligibility condition (such as school attendance) which is prohibited under Title XIX. With respect to such persons, the financial eligibility standard had to be defined since it could not be automatically assumed by reference to the receipt of cash assistance.

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[120] Indeed, an application for cash assistance is sufficient – a separate medicaid application need not be filed. 45 C.F.R. § 206.10 (a) (1) (iii).

HEW has made absolutely clear that "[t]he *standards of assistance* for the approved State plan for OAA, AFDC, AB or AABD *constitute the income levels for financial eligibility* for the respective programs." HEW Handbook of Public Assistance Administration, Supp. D, § 4240(B)(1) (emphasis added). It would seem incredible that the 100 percent standard of need would determine eligibility for medicaid for those *not* receiving AFDC because of the lack of school attendance, while 50 percent of the standard could determine medicaid eligibility for those who *are* in school.[121] Such an anomaly is again the responsibility of HEW, since in formulating policy without regard to § 402(a)(23), it once again described the standard of need as the financial eligibility yardstick.

The consequences of Texas' denial of AFDC to many needy families cannot be underestimated. According to the Solicitor General, the value of medical assistance to an average AFDC family in Texas is $50-$60 per month.[122] Thus in

[121] HEW agrees with our interpretation of its regulation, namely that the financial eligibility conditions referred to in 45 C.F.R. § 248.21(a)(1)(i) are the standards of assistance. In an *amicus* brief filed on another issue in Colorado, the agency told the Court:

> "D-4220B.1. and the second paragraph of D-4240.B.1 make it very clear that, for inclusion of categorically needy individuals who are not receiving cash assistance, the financial eligibility conditions of the pertinent State plan for cash assistance will apply. The standards of assistance for these plans [e.g., AFDC] are expressly stated to constitute the income levels for financial eligibility." Brief for the United States as Amicus Curiae, p. 15, *Fullington v. Shea*, 320 F. Supp. 500 (D. Colo. 1970), *aff'd* 40 U.S.L.W. 3249 (Nov. 22, 1971).

This is consistent with other HEW literature describing Title XIX. HEW has noted, for example, that medical "[c]overage is mandatory for . . . members of families with dependent children who meet the minimum eligibility requirements specified in . . . Title IV; and *who are eligible for a money payment under the State's definition of a needy person.*" NCSS Report B-1, May 1970, p. 4. n. 3.

[122] Medical assistance in Texas includes reimbursement for the following care and services: Inpatient hospital care, outpatient hospital

dollar terms alone, the refusal to aid "needy" families under the state's standards is significant; such families not only may have an unmet need for basic subsistence such as food, clothing and shelter which is as much as 25% of their total basic needs (50% under the reduction used in 1969 when the case was first decided), but they will be completely shut off from required medical care. Studies conducted prior to the availability of free medical care under the medicaid legislation, showed that 30% of the persons with family incomes of less that $2,000 spent *nothing at all* on medical care in 1962. See National Center for Health Statistics, *Medical Care, Health Status and Family Income,* at 51 (1964). This startling figure shows clearly that poor persons are forced to forego medical assistance in order to purchase the basic rudiments of life. How much more exaggerated this need must be if such persons are denied the minimal amounts deemed necessary for survival by the state. If appellants prevail, Texas will *not* be required to meet their basic needs in full under the AFDC program. That much we concede. However, Texas would be required to provide federal medical assistance protection to all needy persons. The Congressional mandate we seek to enforce makes practical, as well as legal sense. Medical costs are often catastrophically high. While predictable recurring needs which are in the family's normal range of expenses can be budgeted and planned for, however unhealthy the resulting subsistence may be, medical costs are impossible to plan for and meet in this way. Texas' method for determining AFDC eligibility not only makes subsistence planning for needy families exceptionally difficult, it also deprives them of any resources to meet the medical needs of their children.

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care, physicians' services, nursing home care, laboratory and X-ray services, and limited optometric, chiropractic, podiatric, and ambulance services. State Department of Public Welfare, 1970 Annual Report, p. 19-20.

2. Aid Must Be Furnished to All Eligible Individuals

Appellants submit that HEW's interpretation of §402(a)(23) places that section in direct conflict with another plan requirement, § 402(a)(10), 42 U.S.C. § 602(a)(10), previously construed by this Court in *Dandridge v. Williams, supra* and *King v. Smith, supra.* Since both provisions must be read together, *e.g. Harmon v. Brucker,* 355 U.S. 579 (1958), the conflict must be resolved by requiring the standard of need to be the standard used to determine financial eligibility for AFDC.

Section 402(a)(10) provides that "all individuals wishing to make application for aid to families with dependent children shall have an opportunity to do so, and that *aid* to families with dependent children *shall be furnished* with reasonable promptness *to all eligible individuals.*" (emphasis added). The Texas plan denies aid to "eligible individuals, *i.e.* children and their relative-caretakers with available income greater than the applicable percentage of the standard of need (50% or 75%), but less than the standard of need (the 100% standard) who otherwise meet the definition of dependency set out in federal law. All children who are needy, age-qualified, and deprived of parental support are "dependent children" within the meaning of §406(a), 42 U.S.C. §606(a), and thus denying aid to *some* of those dependent children is contrary to § 402(a)(10). *King v. Smith, supra.* HEW disagrees with our interpretation of §402(a)(10). In its view, "eligible individual" as used in that section "is one who has been found eligible for a payment of benefits, not one who has been found to meet the state's standard of need." *Amicus,* p. 10. In other words, HEW believes that despite the Court's conclusion in *King,* Texas *may* deny aid to some dependent children. We believe HEW's construction is an incorrect one in light of the legislative history of §402(a)(10) and this Court's decision in *Dandridge* (as well as *King* itself).

As noted earlier in the brief, the Social Security Act failed to include a requirement that assistance be furnished by states in sufficient amounts to provide "a reasonable subsistence compatible with decency and health," as originally proposed by the Administration. Thus, the Social Security Board was powerless to condition plan approval on adequate state funding. As related by Arthur Altmeyer, former Chairman of the Social Security Board, this presented a difficult question for the Board, since whenever inadequate state and local funds were appropriated only two alternatives, both undesirable, were available.

> "One method was to spread these funds so that the same proportion of need should be met for every eligible individual. The other method was to meet the minimum need of eligible individuals in the order of their application for assistance. This second method would, of course, result in waiting lists of eligible needy individuals who would be receiving no assistance." Altmeyer, A.J., *The Formative Years of Social Security* (1968), p. 61.

The Social Security Board, and the Bureau of Public Assistance, opted for the second alternative, deeming it "more effective in impressing upon the state legislatures the necessity of providing adequate funds because of the obvious existence of the waiting lists of eligible needy persons." *Ibid.*

In 1949, the Administration recommended an end to waiting lists in all categorical programs as a means of dealing with insufficient funds. H.R. 6000, 81st Cong., 1st Sess. With respect to Old Age Assistance, the Report of the Committee on Ways and Means stated:

> "Applicants who have already been found eligible are kept waiting for assistance until persons on the rolls die or cease to receive assistance for other reasons. In a program supported from public funds such discrimination is unjustifiable. *Available funds should be used for the benefit of all persons who*

> *meet the conditions of eligibility, even if the amount of assistance granted those already on the rolls must be reduced.*" House Comm. on Ways and Means, Social Security Act Amendment of 1949: Report to Accompany H.R. 6000, H. Rept. 1300, 81st Cong., 1st Sess. (1949), p. 43 (emphasis added).

The Committee added that with respect to dependent children "this difference in treatment accorded to eligible persons results in undue *hardship on needy persons* and is inappropriate in a program financed from Federal funds." *Id.* at 48 (emphasis added). What is now §402 (a)(10) was enacted by Congress in August 1950. The federal agency's early approach to inadequate state funding was thus specifically rejected by Congress. *Funds would have to be allocated to all eligible persons even if payments must thereby be reduced.*

Texas' AFDC program violates both the literal language of §402 (a)(10) and the spirit in which it was enacted. The record is replete with statistics as to the sharp increase in AFDC rolls during the years preceding the adoption of the percentage reduction method. Those increases were due undoubtedly to a variety of factors – the elimination of illegal eligibility requirements, poor economic conditions causing high unemployment, even a greater community awareness of the availability of public aid, and the statutory entitlement to it.[123] Further increases in the AFDC rolls should have been expected following the adjustment to the AFDC cost standard implemented May 1, 1969. In

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[123] We have already noted that a substantial increase in the AFDC rolls is attributable to the decision in *King v. Smith, supra.* Appellees reports also show that applications increased by 15% in fiscal 1968, and 23% in 1969. During the same period, application approvals based on the applicants' change in financial need during the year was 72% in 1968 and 67% in 1969, with loss of employment responsible for 39% and 37% of the approvals. See Dept. of Public Welfare 1968 Annual Report, p. 3, and Table 19; Dept. of Public Welfare 1969 Annual Report, p. 11, and Table 19.

order to conserve state funds, an objective entirely permissable under the federal act, Texas has chose the vehicle disapproved by Congress – it has stricken from the rolls many needy families with dependent children to whom it was providing assistance, and is keeping off the rolls those families who were recently recognized as needy after the cost of living adjustment, and who in all relevant respects qualify for assistance (their children are dependent, and they are "needy" under state standards). Appellees and HEW have joined to resurrect the policy originally urged by the Social Security Board, but later discarded by that agency and rejected by Congress in 1950 as the means of alerting the public to inadequate welfare programs.

Our interpretation of § 402(a)(10) is fortified by the decision of this Court in *Dandridge v. Williams, supra,* decided the same day as *Rosado*. In *Dandridge*, the Court rejected the claim that a dollar maximum on family payments completely denied aid to the youngest children in very large families, and thus violated § 402(a)(10). The Court felt that "a more realistic view is that the lot of the entire family is diminished because of the presence of additional children without any increase in payments." 397 U. S. at 477. Since the "practical effect" of the family maximum "is that *all children*, even in very large families, do *receive some aid*," *Id.* at 481 (emphasis added), the Court found no violation of §402(a)(10):

> "We find nothing in 42 U.S.C. § 602(a)(10) that requires more than this. *So long as some aid is provided to all eligible families and all eligible children,* the statute itself in not violated." 397 U.S. at 481 (emphasis added).

The *amicus* concedes that if this Court's interpretation of §402(a)(10) "is a binding construction of the Act" appellants are entitled to prevail, *amicus,* p. 9; but states that in its view all "needy" and otherwise eligible families are *not* "eligible individuals" under § 402(a)(10) and "the [above] quoted language was unnecessary to the decision in Dandridge." *Ibid.*

HEW misconstrues the issue addressed by the Court in *Dandridge*. If it were not required under § 402(a)(10) that each needy and dependent child receive *some* aid, at least via his family's grant, why then did the Court engage in the rather involved analysis it did in order to decide the case? If the language considered dictum by the *amicus* were not necessary to the decision in *Dandridge*, that case could have been disposed of by the simple assertion that Maryland could deny payments to some of its needy and dependent children. Under a construction of the Act which permits the denial of aid to some needy individuals, it would have been quite irrelevant whether or not appellees in *Dandridge* correctly characterized the significance of Maryland's regulation as denying aid completely to the sixth and younger children. But the Court took pains to redefine the question presented, and clearly held in *Dandridge* thatAFDC payments could be limited by reducing the family's total grant, since in so doing each member of the family still received "some aid". Indeed, in his dissenting opinion Justice Marshall took the view that the majority analyzed the maximum grant regulation as it did (i.e. a per capita reduction in the *family* grant) so that it could reach the *required* conclusion that all needy children received some aid. 397 U.S. at 511.[124] See also Douglas, J. Dissenting, *Dandridge*, 397 U.S. at 502.[125] Thus, the only bone of contention on the statutory claim in *Dandridge* was whether each eligible individual was *in fact* being aided where the state limited payments for families beyond a cer-

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[124] Justice Marshall's position was that § 402(a)(10) requires the states to "take into account the needs of, and provide aid with respect to, *all* needy dependent children. Indeed, that was our assessment of the Congressional design embodied in the AFDC program in *King v. Smith* . . ." *Ibid.* (emphasis added.)

[125] Justice Douglas referred to the Court's rationale as an avoidance of the requirement of § 402(a)(10) that financial benefits "reach each individual recipient eligible under the *federal criteria*." *Ibid.* (emphasis added).

tain size. All members of the Court assumed that Maryland could not refuse to aid some children who were needy and dependent as those terms are federally defined. The question posed in this case, then, is easier—some eligible families are completely denied aid by Texas, and thus some needy and dependent children do not receive any aid.

Finally, HEW's position that "eligible individuals" means only persons the state choses to aid, and thus § 402(a)(10) merely serves to outlaw "waiting lists," not only conflicts with the legislative history, *King*, and *Dandridge*, but also with HEW's own position in State Letter 1074 and in its *amicus* in *Engleman v. Amos, supra* (as well as this Court's summary affirmance in *Amos*). First, State Letter 1074, in pertinent part, reads as follows: "if the total net family income is less than the assistance standard the family is eligible." It would appear that this position by the federal agency is diametrically opposed to its view of "eligible individuals" set out in the *amicus*.[126]

Second, the major thrust of HEW's objection to the New Jersey ceiling in *Amos* was that it operated to deny aid to persons "intended to be eligible under the federal act." *Amos amicus*, p. 9, n. 6. According to HEW, "unlike the established means for reducing payment levels, [the New Jersey provision] *does not operate directly on the amount the state is to pay*, – as by taking *a percentage of the amount*, or *setting a ceiling on it*." *Ibid.* (emphasis added.) New Jersey's reduction, complained HEW, operated by considering the family's *total income* and "embodies a judgment that it needs no more." *Ibid.* The crux of HEW's objection to this provision was that:

> "[W]hile reductions of payment level may have disparate effects, [the New Jersey regulation] entirely

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[126] HEW cannot suggest that the eligibility determination referred to *only* applies to those with earned income subject to § 402(a)(8), and not to *all* persons with "income less than the assistance standard" since it was precisely such a procedure which in its view rendered New Jersey's method in *Amos* illegal. See *amicus*, p. 12.

> eliminates benefits for some persons entitled to them under the federal plan. For the individual so affected, it is hard to characterize what the state has done as a mere 'reduction of payment level.' Rather, the determination has been made that he, as an individual, needs no welfare payments. See *Dandridge, supra,* 397 U.S. at 481." *Ibid.*[127]

Texas' method similarly does not operate directly on the "amount the state is to pay," i.e. the budgetary deficit. Instead, Texas applies its reduction to total needs as determined by the state's standard, and uses only the resulting portion of total needs to determine eligibility ("recognizable needs" as Texas characterizes its percentage reduced level). Such a characterization also embodies a judgment that the family needs no more. The evil HEW saw in New Jersey's provision thus inheres in Texas' as well. Texas, by using this method, has eliminated benefits for many persons who are in fact needy under the state's AFDC plan.[128] In sum, appellants contend that the federal act defines the class of eligibles worthy of aid – all needy families (under State standards) with dependent children as defined in the federal act. In the instant case, families such as Mrs. Davila's have needy dependent children but are denied aid. We submit that such families are "eligible" under *federal* criteria (which, with respect to need, relies upon the state's standards), and thus are entitled to some aid under § 402(a)(10). Unless the Court rejects HEW's position on § 402(a)

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[127] The reliance on *Dandridge* at p. 481 is interesting, since it was at that point the Court held that it was unlawful under § 402 (a)(10) to deny an eligible family of *all* aid.

[128] Indeed, HEW candidly admits that the Texas method may deny aid even to some needy families for whom the earned income exemption has been computed (because income was below the standard of need; State Letter 1074). Such a result would obtain if the percentage is sufficiently low. HEW's hypothetical budget for Texas would create this anomaly of persons "eligible" for the income exemption but not for a cash payment, at 52%. *Amicus*, p. 5, n. 3. We note that Texas began using this method at a 50% level and that two states (Louisiana and Alabama) are now below the 52% level.

(23), the statutory commands of Title IV will be in conflict.

D. Congress Has Balanced the Equities and Has Spoken In Favor of Increased Eligibility.

HEW's *amicus* suggests that the provisions challenged herein may have been promulgated in an effort to distribute limited state welfare funds in a way that "assures a greater proportion to those least able to care for themselves." *Amicus*, p. 11. Thus, as the *amicus* notes, if appellants prevail; and Texas decides to maintain AFDC expenditures at the same level, the percentage factor would have to be reduced to the detriment of families with *no* outside income. *Id.* at 7. Appellants do not fail to appreciate the harmful effect on many poor people in Texas should this be the result of their lawsuit. However, they believe that the relative equities were already considered by the Congress, and thus the Court is bound to enforce that legislative judgment. Moreover, it is appellants' view that the equities in any case favor increased eligibility.[129]

It is well to begin by comparing Texas' method of allocating its limited welfare funds with New Jersey's. Unlike New Jersey, Texas uses a device which completely cuts off from cash assistance and medical care thousands of families who under the state's own standards do not have the resources to provide themselves a minimally adequate standard of living.

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[129] It is fair to weigh the possible effects which this Court's interpretation of § 402 (a)(23) might have, since such a consideration may provide a clue as to what Congress may have in fact intended. In *Rosado* too the Court had to look at the "common assumptions" which must be made in the absence of specific intent expressed by the Congress. 397 U.S. at 412. However, given this Court's prior interpretation of § 402 (a)(23) in *Rosado*, the legislative history upon which we rely, and the federal agency's development of its present position, the burden is most definitely on appellees to demonstrate that our interpretation of § 402 (2)(23) is so unreasonable that Congress could not have possibly intended its consiquences.

While we agree with this Court's decision in *Amos* that New Jersey's regulation violated the federal Act, New Jersey did not deny aid to *any* families with total income below the state's minimum need level. Congress may well have considered it an improper use of federal funds to subsidize a state's refusal to contribute *any* of its resources to lessen the plight of a substantial number of its needy children.

Moreover, in considering the various alternatives in 1967, Congress spoke in favor of increasing the availability of work training programs, family counseling and family planning services, and medical assistance, all deemed "vital" by the Ninetieth Congress. See *Lampton v. Bonin, supra,* 304 F. Supp. at 1389; *Rosado v. Wyman, supra,* 397 U.S. at 413. It is not unusual for Congress to accomplish one legislative purpose at the possible expense of another worthy objective.

Thus, in enacting § 402 (a)(8), for example, Congress recognized the unfairness in some families being denied aid who are at the same income level as other families, solely because the latter were already receiving assistance when their incomes were increased by employment. See Comm. on Finance, Report on H.R. 12080, S. Rep't. No. 744, 90th Cong., 1st Sess. (1967), p. 159; *Connor v. Richardson, supra*. But Congress nonetheless was determined to find an approach to encouraging meaningful work as a means of reducing the dependency on public assistance and desiring to limit the cost of such a program, chose to restrict the availability of the incentive provision.

Here too, in § 402(a)(23) Congress determined not to require the much needed increase in AFDC grants across the nation, and compromised in favor of increased eligibility for supplementation and concomitant services. After all, medicaid alone is worth $50 to $60 per month to an AFDC family in Texas. While such an approach may have subjected some recipients to a risk of grant reductions, and

the question may have been a close one, it was not unreasonable for Congress to opt for the alternative we urge it did. That decision was Congress' and may not be abrogated by administrative reluctance to enforce the Congressional will. If Texas believes Congress struck an unwise compromise, its recourse is to the Congress, where its voice is not an unheard one.

CONCLUSION

The judgment of the District Court should be reversed with respect to both the constitutional and statutory claims presented herein and the case should be remanded to that Court for further proceedings consistent with such a disposition.

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Respectfully submitted,

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APPENDIX A

STATES USING PERCENTAGE REDUCTIONS WHICH ARE NOT UNIFORM AMONG THE CATEGORIES (10/70)[1]

States	Highest % in Adult Category	AFDC %[2]	Disparity
Alabama	100% (OAA, AB)	35%	65%
Arizona	100% (OAA, AB, APTD)	65%	35%
Florida	100% (OAA, AB, APTD)	60%	40%
Iowa	100% (AB)	81.2%	18.8%
Kentucky	100% (OAA, AB, APTD)	86.5%	13.5%
Louisiana	100% (OAA, AB, APTD)	51%	49%
Mississippi	100% (OAA,AB, APTD)	30%	70%
New Mexico	100% (OAA, AB, APTD)	90%	10%
North Carolina	100% (OAA, AB, APTD)	86%	14%
Oklahoma	100% (OAA, AB, APTD)	85%	15%
Oregon	100% (AB)	80%	20%
South Carolina	100% (OAA, AB, APTD)	52%	48%
Texas[3]	100% (OAA)	75%	25%
Vermont	100% (OAA, AB, APTD)	89.5%	10.5%
Virginia	100% (OAA, AB, APTD)	90%	10%
Wisconsin	100% (OAA, AB, APTD)	82.9%	17.1%

[1] HEW, Social and Rehabilitation Service, Program Statistics and Data Systems, NCSS Report D-3 (10/70), Table 3 – Special types of public assistance: Method of reducing money payments to recipients in States making reductions, by program, October 1970. According to the Appendix in the *Amicus Curiae* brief filed by the Solicitor General prior to the noting of probable jurisdiction in this case, twelve states, as of September 1971, have applied percentage reductions to their AFDC programs which were not reflected in the NCSS material of October 1970. We are unable to analyze these states in terms of a possible percentage disparity with the adult categories because appellants have no information with respect to these categories later than the October 1970 NCSS Report. However, one of these states is New York which now pays 90% of need in AFDC (which is overwhelmingly Black and Puerto Rican) and continues to pay 100% of need in all adult categories (which are overwhelmingly white). See *Goodwin v. Wyman*, 330 F. Supp. 1038 (S.D.N.Y. 1971), *juris. statement filed*, Term 1971, No. 71-5647.

[2]No distinction has been made in this column between percentage reductions applied to the standard of need before the consideration of income and those applied to the budgetary deficit computed after the consideration of income.

[3]Texas is reflected in this chart as paying 75% of need and thus has a percentage disparity of 25%. As of the date of the district court's original decision, the reduction and disparity were 50%.

APPENDIX B

RACIAL COMPOSITION OF AFDC AND OAA CATEGORIES IN STATES WITH PERCENTAGE DISPARITY GREATER THAN 25%

State	%Disparity [1]	AFDC [2]		OAA [3]	
		White-Anglo	Other	White-Anglo	Other
Alabama	65%	29.1%	70.9%	59.9%	40.7%
Arizona	35%	16.7%	83.3% [4]	74.7% [5]	25.3%
Florida	40%	24.1%	75.9%	63.9%	36.1%
Louisiana	49%	22.4%	77.5%	52.4%	37.7%
Mississippi	70%	13.4%	86.6%	45%	55%
South Carolina	48%	24.5%	75.5%	46.6%	53.4%
Texas [6]	25%	17.5%	82.5% [4]	77.5% [5]	22.5%

[1] See Appendix A.

[2] HEW, Social and Rehabilitation Service, July 1970, NCSS Report AFDC-3 (67), Table 2 – AFDC families and recipient children, by race, 1967.

[3] HEW, Welfare Administration, Bureau of Family Services, Division of Research, May 1967, Table 3 – Race and sex of OAA recipients, by State and census division, 1965.

[4] HEW, Social and Rehabilitation Service, July 1970, NCSS Report AFDC-3 (67), Table 3 – AFDC families and recipient children, by Latin American birth or ancestry, 1967. This figure was derived by combining information from two sources, Table 2, cited in footnote 2, and Table 3 cited here. The first distinguishes four categories, "white," "Negro," "American Indian," and "other." The second source provides a further analysis in terms of percentages of recipients of Latin American descent. In examining the data it is evident that this group was reported as "white," in Table 2, but they are considered "other" for the purposes of our analysis.

[5] This figure is probably somewhat inflated since Latin American recipients were presumably reported as "white." No further data for this group was available in the NCSS materials.

[6] The racial composition of the OAA and AFDC programs in Texas shown here differs slightly from the composition stipulated by the parties to this case, obviously reflecting a different sample, taken over a different time period.